UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

GLASS FABRICATORS, INC. AND GLASS AND METAL SOLUTIONS, INC., NOT ALTER EGOS	)	CASE 08-CA-174567
AND	)	SEPARATE
INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES DISTRICT COUNCIL 6	)	MOTION FOR SUMMARY JUDGMENT IN FAVOR OF GLASS AND METAL SOLUTIONS, INC.

Glass and Metal Solutions, Inc. hereby moves for summary judgment in its favor on the Complaint, in its entirety, as it is not the alter ego of the separate company Glass Fabricators, Inc.

Here, every claim for relief referenced in the Complaint hinges upon the impossible determination that Dale Dotson's small company Glass and Metal Solutions, Inc., which employs Dale Dotson, his son and a helper as they install low level storefront windows with hand tools, is an alter ego of his wife's failed company Glass Fabricators, Inc., which was a large company employing more than two dozen people manufacturing and installing glass building envelopes on downtown skyscrapers. The claims against the larger failed company are not argued in this Motion. This Motion is filed only on behalf of the separate small company owned by Dale Dotson because, on the linchpin issue of alter ego, the Complaint fails as there is no factual support for such a finding. There is no genuine dispute as to any material fact and Dale Dotson's small company Glass and Metal Solutions, Inc. is entitled to judgment as a matter of law on the Complaint - in its entirety. The grounds for this motion are as follows:

I. STATEMENT OF FACTS

The sole owner of Glass and Metal Solutions, Inc., Dale Dotson, was a member of the Union (District Council 6, Painters and Glazers) for a total of seven (7) years including the last five (5) of which he was employed by his wife's separate company Glass Fabricators, Inc. (until approximately January 2014). Affidavit of Dale Dotson, at ¶ 2. The Affidavit of Dale Dotson is attached hereto and incorporated herein by reference. Glass Fabricators, Inc. was owned entirely by his wife, Patricia Dotson. Dale Dotson never owned any shares in Glass Fabricators, Inc. Affidavit of Dale Dotson, at ¶ 8.

Dale Dotson was employed by his wife's company, Glass Fabricators, Inc., as a foreman for approximately twenty (20) years. In that capacity, he ran machinery used to manufacture glass products, cut glass in the manufacture of glass products, and supervised other employees. Glass Fabricators, Inc. had another foreman as well. Affidavit of Dale Dotson, at ¶ 3. Glass Fabricators, Inc. was a large company, employing over thirty (30) people. Affidavit of Dale Dotson, at ¶ 7.

The primary business purpose of Glass Fabricators, Inc. was the large-scale fabrication and manufacturing of glass products for large commercial buildings and then installation of the glass products it manufactured onto large commercial buildings like skyscrapers in downtown Cleveland, Ohio including, for example, the glass building envelope on the Federal Building where the NLRB is located. All of the work performed by Glass Fabricators, Inc. was within the State of Ohio. Affidavit of Dale Dotson, at ¶ 4.

Glass Fabricators, Inc. was located in one unit at a multi-tenant building located at 2160 Halstead Avenue, Lakewood, Ohio. The building was owned by Realty Acquisitions, which

Dale Dotson owned at that time, but it has since ceased operations. Affidavit of Dale Dotson, at ¶ 5.

Glass Fabricators, Inc. used specialized large manufacturing equipment and machinery in fabricating and manufacturing the large glass products that it produced. As installation of its large glass building envelope products was high in the air, many stories, Glass Fabricators, Inc. used cranes and lifts and equipment capable of scaling large downtown buildings. The products it made and transported to the job sites were very large, requiring the use of large specialized equipment as well in the transportation and delivery of its products. Affidavit of Dale Dotson, at ¶ 6.

When his wife's company Glass Fabricators, Inc. failed and went out of business, Dale Dotson had to find another source of income. He started his own, much smaller company that he named Glass and Metal Solutions, Inc. to employs himself, his son and a helper or two at any given time. Dale Dotson am the sole owner of Glass and Metal Solutions, Inc., which is an Ohio corporation in good standing. Patricia Dotson has never owned any shares of Glass and Metal Solutions, Inc. Affidavit of Dale Dotson, at ¶ 9.

There has never been any business relationship between Glass and Metal Solutions, Inc. and Glass Fabricators, Inc. at all. They have not bought or sold equipment or products to each other, have not assigned contracts to each other, have not fulfilled contracts for each other, have not subcontracted with each other and have not been vendors or suppliers to each other in any manner whatsoever. Affidavit of Dale Dotson, at ¶ 10.

Dale Dotson's small company Glass and Metal Solutions, Inc. began operating sometime in mid 2014. As he owned the company that owned the multi-tenant building, he had initially

used 2160 Halstead Avenue, Lakewood, Ohio as a mailing address to file the Articles of Incorporation while he looked for a location for his company Glass and Metal Solutions, Inc. From the time Glass and Metal Solutions, Inc. began operations, it has always been located at 36821 Sugar Ridge Road, North Ridgeville, Ohio 44039. Affidavit of Dale Dotson, at ¶ 11. Therefore, Glass and Metal Solutions, Inc. has never purchased, assumed, operated, taken-over or commenced any operations at the location that had been used by of Glass Fabricators, Inc. Affidavit of Dale Dotson, at ¶ 12.

Dale Dotson's small company Glass and Metal Solutions, Inc. did not get any equipment from Glass Fabricators, Inc. to start business. It did not have to, as Glass and Metal Solutions, Inc. only uses small hand tools such as, for example, approximately two saws, and six or seven sets of cordless drills, and maybe a belt sander. Affidavit of Dale Dotson, at ¶ 13.

That is because Glass and Metal Solutions, Inc. does not manufacture any glass products, much unlike his wife's failed company. Instead, the primary business purpose of Dale Dotson's company Glass and Metal Solutions, Inc. is simply to install glass and metal storefront windows, doors and panels onto low level storefronts in small retail stores like you might find at a strip mall. Affidavit of Dale Dotson, at ¶ 14. The glass that is installed by Glass and Metal Solutions, Inc. is manufactured by someone else and is delivered to the jobsite by someone else. Affidavit of Dale Dotson, at ¶ 16.

In the beginning, as a small part of its business, Glass and Metal Solutions, Inc. also made some repairs to low level glass windows or doors on buildings or to retail homes in the State of Ohio. But, the vast majority of the work by Glass and Metal Solutions, Inc. has always been outside the State of Ohio. Further, for approximately the last year and a half almost all of

the work by Glass and Metal Solutions, Inc. has been outside of the State of Ohio. Affidavit of Dale Dotson, at ¶ 15.

Other than Dale Dotson, the employees for Glass and Metal Solutions, Inc. are only his son Dale Dotson, Jr., and an installer named Ryan Marrone. Affidavit of Dale Dotson, at ¶ 17. While Dale Dotson and his son had worked for Glass Fabricators, Inc. in the past, Ryan Marrone had never worked for Glass Fabricators, Inc. Affidavit of Dale Dotson, at ¶ 18.

At one-time Glass and Metal Solutions, Inc. also employed Justin Sargent and Nelson Tabor. Justin Sargent worked for Glass Fabricators, Inc. last in 1994. Nelson Tabor never worked for Glass Fabricators, Inc. At one-time Glass and Metal Solutions, Inc. employed Dale Dotson's daughter Bridgett Dotson, who worked with paperwork on a part-time basis. His daughter has never worked for Glass Fabricators, Inc. At one-time Glass and Metal Solutions, Inc. employed Matthew Fridley and another helper named Marcel neither of who had ever worked for Glass Fabricators, Inc.. Affidavit of Dale Dotson, at ¶ 19.

The work that Dale Dotson does for his own company Glass and Metal Solutions, Inc. is much different than the work that he did when he was employed by his wife's large company Glass Fabricators, Inc. Dale Dotson's small company Glass and Metal Solutions, Inc. does not do fabrications and does not manufacture any glass products at all. The installation work that Glass and Metal Solutions, Inc. performs involves simple hand tools and is performed at low levels. Affidavit of Dale Dotson, at ¶ 20. Dale Dotson's small company Glass and Metal Solutions, Inc. does not own or use any specialized large manufacturing equipment and machinery because it does not fabricate or manufacture the large glass products that were the business of his wife's larger company Glass Fabricators, Inc. In stark contrast, Glass and Metal

Solutions, Inc. does not even deliver the glass products it installs and, therefore, does not own or use large specialized equipment that had been used in the transportation and delivery of products by the large Glass Fabricators, Inc. Affidavit of Dale Dotson, at ¶ 21.

Also, Dale Dotson's small company Glass and Metal Solutions, Inc. does not install glass on upper stories and, therefore, does not own or use cranes and lifts and equipment capable of scaling large downtown buildings that had been used by his wife's large company Glass Fabricators, Inc. when it installed its manufactured products high in the air on downtown buildings. Affidavit of Dale Dotson, at ¶ 22.

Again, the work that Dale Dotson's son does for his small company Glass and Metal Solutions, Inc. is different than the work he did for his mom's larger company Glass Fabricators, Inc. At the larger, now failed, company Glass Fabricators, Inc., Dale Dotson Jr. was a union apprentice, learning the glass trade of fabricating and manufacturing glass products and installing the glass products that were fabricated and manufactured by Glass Fabricators, Inc. Dotson Jr. is not a fabricator for Dale Dotson's small company Glass and Metal Solutions, Inc. because Glass and Metal Solutions, Inc. does not do fabrications. For Glass and Metal Solutions, Inc. Dale Dotson Jr. does site survey-at job sites and coordinates the project which involves the low-level installation of glass products delivered to the job site by others. Dotson Jr. also works on installing the glass using simple hand tools at his dad's small company Glass and Metal Solutions, Inc. unlike the heavy equipment that had been used to install the high-level glass products fabricated by his mom's company Glass Fabricators, Inc. Affidavit of Dale Dotson, at ¶ 23.

Dale Dotson's small company Glass and Metal Solutions, Inc. has never been a part of the Construction Employers Association (CEA). In has also never had a contract with any Union (including Local 181 of District Council 6, Painters and Allied Trades). Affidavit of Dale Dotson, at ¶ 24.

In 2015, Dale Dotson's small company Glass and Metal Solutions, Inc. worked on some small items for approximately five (5) of the many companies that the much larger Glass Fabricators, Inc. had worked for. However, those odd jobs were small scale, low level jobs such as, for example, replacing a broken piece of glass, and were nothing like the large scale high level work of fabricating, manufacturing and installing glass products that his wife's company, Glass Fabricators, Inc. had been in the business of doing. These odd jobs came about when someone from one of those companies would call Dale Dotson's personal cell phone because they happened to know the number. None of the services related to any contracts that they had with his wife's failed company Glass Fabricators, Inc. Affidavit of Dale Dotson, at ¶ 25.

The customers for Glass and Metal Solutions, Inc. are different and the projects are out of the State of Ohio. For Glass and Metal Solutions, Inc. Dale Dotson drives in a pickup truck all over the United States, to install glass and metal storefront windows, doors and panels onto low level storefronts using hand tools because he needs the work. Affidavit of Dale Dotson, at ¶ 26.

II. LAW AND ARGUMENT.

Rule 56(a) of the Federal Rules of Civil Procedure provides that "A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense—on which summary judgment is sought." Rule 56 (a) further provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact

and the movant is entitled to judgment as a matter of law." A fact is material when its resolution affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *See* Id. at 252. Summary judgment is appropriate whenever the non-moving party cannot make a showing sufficient to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Here, every claim for relief referenced in the Complaint hinges upon a determination that Dale Dotson's small company Glass and Metal Solutions, Inc. is simply an alter ego of his wife's failed company Glass Fabricators, Inc. On that linchpin issue, the Complaint fails. There is no genuine dispute as to any material fact on that issue. Dale Dotson's small company Glass and Metal Solutions, Inc. is entitled to judgment as a matter of law on the Complaint in its entirety.

An alter ego relationship between a unionized company and a newly formed nonunion company would require a finding that the two companies exhibit "'substantially identical' management, business purpose, operation, equipment, customers, supervision and ownership." ADF, Inc., & Its Alter Ego Adla, LLC & Int'l Bhd. of Teamsters, Local Union No. 251, 355 NLRB 81, 83 (2010), attached hereto; *see also* Bd. of Trustees of Plumbers v. R. & T. Schneider Plumbing Co., S.D.Ohio No. 1:13-CV-858, 2015 WL 4191297, *16 (July 10, 2015), attached hereto, *citing* Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO v. Dorn Sprinkler Co., 669 F.3d 790, 794 (6th Cir. 2012).

In Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO v. Dorn Sprinkler Co., 669 F.3d 790, 794 (6th Cir. 2012), the "district court granted summary judgment to Defendants,

holding that Dorn Sprinkler was not the alter ego of Dorn Fire Protection, and thus, that Dorn Fire Protection did not have an obligation to arbitrate with the Union." Id., at p. 792. In that case, as here, the "Union relies heavily on the familial relationship between the leadership of the two companies. But even though the characters are the same and are related to one another, this does not necessarily mean the overall nature of management is the same in both companies." Id., at p. 795, *citing* Kenmore Contracting Co. v. Int'l Assoc. of Bridge, Structural, & Orn. Iron Workers, 289 NLRB No. 56 (June 24, 1988).

While Patricia Dotson wholly owned the large company Glass Fabricators, Inc., Dale Dotson was simply one of two foremen at the company working on projects and supervising some of the employees working on projects. In contrast, Dale Dotson is the sole owner of Glass and Metal Solutions, Inc., whereas Patricia Dotson has no ownership interests or managerial responsibilities or even any employment at all. "None of these situations make the management of these two companies substantially identical." Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO v. Dorn Sprinkler Co., 669 F.3d 790, 795 (6th Cir. 2012).

> First, the nature of the management structure in the two companies is not substantially identical. Although the Union suggests that 'the same family members who had managed Dorn Sprinkler also managed Dorn Fire Protection,' the record does not support this contention. The evidence suggests that (1) Christopher Dorn, who was lead salesman at Dorn Sprinkler is now the owner and President of Dorn Fire Protection…

Id., at 794.

"Next, we consider the operation factor." Id., at 795. Here, the larger, failed, Glass Fabricators, Inc. employed dozens of people in its large manufacturing business. In contrast, Dale Dotson's small Glass and Metal Solutions, employs only three people in its low level hand-installation service business. The fact that two of the three employees once worked for the large

Glass Fabricators, Inc. does not make the operations substantially identical. Quite the opposite, it demonstrates that the operations are substantially different.

> This factor tends to cut against alter-ego status because… Although the Union states that Dorn Fire Protection employed 'a number of former employees of Dorn Sprinkler,' only two of the fourteen Dorn Fire Protection employees worked for Dorn Sprinkler at or around the time of its closing, showing no real continuity of work force. Accordingly, the two companies' operations are not strongly related."

Id., at 795.

"We also consider the equipment used by each company… Dorn Fire Protection began operations with all of its own tools." Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO v. Dorn Sprinkler Co., 669 F.3d 790, 795 (6th Cir. 2012). Here, none of the tools are the same and Glass and Metal Solutions, Inc. does not even own any manufacturing, high-lift or delivery equipment or machinery – because it does not make anything.

> Next, we consider the customer base of the two companies. Despite the Union's claim that Dorn Fire Protection's customers " included a number of former Dorn Sprinkler customers," proportionally speaking, this argument is simply not persuasive. Only nine out of Dorn Fire Protection's more than 250 customers were formerly Dorn Sprinkler customers. Moreover, when Dorn Sprinkler went out of business, Dorn Fire Protection completed only two of the projects that were pending for Dorn Sprinkler and, when asked, declined to complete another. However, several other contractors picked up where Dorn Sprinkler left off on other projects pending at that time. Thus, the customer factor also suggests Dorn Fire Protection is not an alter ego of Dorn Sprinkler

Id., at 796. Here as well, aside from a few odd jobs during the first year, there is no overlap of customers and Dale Dotson's small Glass and Metal Solutions, Inc. does not even work in the same State.

"Finally, there is no evidence of intent on the part of the two companies to avoid the effect of the collective bargaining agreement… Apart from this insinuation…" Id., at p. 796.

The facts in this case cannot support an alter-ego determination. As a matter of law, defendant Glass and Metal Solutions, Inc. is entitled to summary judgment in its favor on the Complaint in its entirety.

Respectfully submitted,

/S/ STEPHEN B. DOUCETTE

STEPHEN B. DOUCETTE (0062376)
GLOWACKI, IMBRIGIOTTA &
DOUCETTE, L.P.A.
7550 Lucerne Drive, Suite 408
Middleburg Heights, OH 44130
Telephone (440) 243-2727
Facsimile (440) 243-2636
sbd@gidlaw.com
Attorneys for Glass and Metal Solutions, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that on July, 2017 a copy of the foregoing was filed electronically through the National Labor Relations Board's e-filing system. Additionally, copies were served upon each of the following by e-mail and regular U.S. Mail:

Attorney for Glass Fabricators, Inc
Patrick J. Thomas, Esq.
1360 E. 9th Street
1000 IMG Center
Cleveland, OH 44114-1737
pthomas@rcp-attorneys.com

Attorney for International Union of Painters & Allied Trades
Kera L. Paoff, Esq.
Widman & Franklin, LLC
405 Madison Avenue, Ste. 1550
Toledo, OH 43604-1275
kera@wflawfirm.com

Additionally, a copy of the foregoing was served upon each of the following by regular U.S. Mail:

International Union of Painters & Allied Trades
District Council 6
8257 Dow Circle
Strongsville, OH 44136-1761

/S/ STEPHEN B. DOUCETTE

STEPHEN B. DOUCETTE (0062376)
GLOWACKI, IMBRIGIOTTA &
DOUCETTE, L.P.A.
Attorneys for Glass and Metal Solutions, Inc.

STATE OF OHIO)
) ss. AFFIDAVIT
COUNTY OF CUYAHOGA)

DALE DOTSON, being first duly sworn according to law, declares, deposes and states as follows:

1. I am over 21 years of age, competent to testify to the matters stated herein, and make this Affidavit upon personal knowledge.

2. I was a member of the Union (District Council 6, Painters and Glazers) for a total of seven (7) years including the last five (5) of which while I was employed by Glass Fabricators, Inc., until approximately January 2014.

3. I was employed by Glass Fabricators, Inc. as a foreman for approximately twenty (20) years. In that capacity, I ran machinery used to manufacture glass products, cut glass in the manufacture of glass products, and supervised other employees. Glass Fabricators, Inc. had another foreman as well.

4. The primary business purpose of Glass Fabricators, Inc. was the large-scale fabrication and manufacturing of glass products for large commercial buildings and then installation of the glass products it manufactured onto large commercial buildings like skyscrapers in downtown Cleveland, Ohio including, for example, the glass building envelope on the Federal Building where the NLRB is located. I believe that all of the work performed by Glass Fabricators, Inc. was within the State of Ohio.

5. Glass Fabricators, Inc. was located in one unit at a multi-tenant building located at 2160 Halstead Avenue, Lakewood, Ohio. The building was owned by Realty Acquisitions, which I owned at that time, but it has since ceased operations.

6. Glass Fabricators, Inc. used specialized large manufacturing equipment and machinery in fabricating and manufacturing the large glass products that it produced. As installation of its large glass building envelope products was high in the air, many stories, Glass Fabricators used cranes and lifts and equipment capable of scaling large downtown buildings. The products it made and transported to the job sites were very large, requiring the use of large specialized equipment as well in the transportation and delivery of its products.

7. I believe that Glass Fabricators, Inc. has employed over thirty (30) people.

8. Glass Fabricators, Inc. was owned by Patricia Dotson. I never owned shares in Glass Fabricators, Inc.

9. I am the sole owner of Glass and Metal Solutions, Inc., which is an Ohio corporation in good standing. Patricia Dotson has never owned any shares of Glass and Metal Solutions, Inc.

10. There has never been any business relationship between Glass and Metal Solutions, Inc. and Glass Fabricators, Inc. at all. They have not bought or sold equipment or products to each other, have not assigned contracts to each other, have not fulfilled contracts for each other, have not subcontracted with each other and have not been vendors or suppliers to each other in any manner whatsoever.

11. Glass and Metal Solutions, Inc. began operating sometime in mid 2014. I used 2160 Halstead Avenue, Lakewood, Ohio as a mailing address to file the Articles of Incorporation while I looked for a location for Glass and Metal Solutions, Inc. to operate out of but from the time it began operations Glass and Metal Solutions, Inc. has always been located at 36821 Sugar Ridge Road, North Ridgeville, Ohio 44039.

12. Glass and Metal Solutions, Inc. has never purchased, assumed, operated, taken-over or commenced any operations at the location that had been used by of Glass Fabricators, Inc.

13. Glass and Metal Solutions, Inc. did not get any equipment from Glass Fabricators, Inc. to start business. Glass and Metal Solutions, Inc.uses small hand tools such as, for example, approximately two saws, and six or seven sets of cordless drills, and maybe a belt sander.

14. Glass and Metal Solutions, Inc. does not manufacture any glass products. The primary business purpose of Glass and Metal Solutions, Inc. is to install glass and metal storefront windows, doors and panels onto low level storefront windows in small retail stores like you might find at a strip mall.

15. In the beginning, as a small part of its business, Glass and Metal Solutions, Inc. also made some repairs to low level glass windows or doors on buildings or to retail homes in the State of Ohio. But, the vast majority of the work by Glass and Metal Solutions, Inc. has always been outside the State of Ohio. Further, for approximately the last year and a half almost all of the work by Glass and Metal Solutions, Inc. has been outside of the State of Ohio.

16. The glass that is installed by Glass and Metal Solutions, Inc. is manufactured by someone else and is delivered to the jobsite by someone else.

17. The employees for Glass and Metal Solutions, Inc. other than myself, are my son Dale Dotson, Jr., and an installer named Ryan Marrone.

18. The only common employees between Glass Fabricators, Inc. and Glass and Metal Solutions, Inc. are myself and my son. While I and my son had worked for Glass Fabricators, Inc. in the past, to my knowledge Ryan Marrone had never worked for Glass Fabricators, Inc.

19. At one-time Glass and Metal Solutions, Inc. also employed Justin Sargent and Nelson Tabor. Justin Sargent worked for Glass Fabricators, Inc. last in 1994. Nelson Tabor never worked for Glass Fabricators, Inc. At one-time Glass and Metal Solutions, Inc. employed my daughter Bridgett Dotson, who worked with paperwork on a part-time basis. My daughter has never worked for Glass Fabricators. At one-time Glass and Metal Solutions, Inc. employed Matthew Fridley and another helper named Marcel to my knowledge, neither of them had ever worked for Glass Fabricators

20. The work that I do for Glass and Metal Solutions, Inc. is much different than the work that I did for Glass Fabricators, Inc. Glass and Metal Solutions, Inc. does not do fabrications and does not manufacture any glass products at all. The installation work that Glass and Metal Solutions, Inc. performs involves simple hand tools and is performed at low levels.

21. Glass and Metal Solutions, Inc. does not own or use any specialized large manufacturing equipment and machinery because it does not fabricate or manufacture the large glass products that were the business of Glass Fabricators, Inc. Glass and Metal Solutions, Inc. does not deliver the glass products it installs and, therefore, does not own or use large specialized equipment like Glass Fabricators, Inc. used to use in the transportation and delivery of Glass Fabricators, Inc.'s products.

22. Glass and Metal Solutions, Inc. does not install glass on upper stories and, therefore, does not own or use cranes and lifts and equipment capable of scaling large downtown buildings like Glass Fabricators, Inc. used to install Glass Fabricator's products high in the air on downtown buildings.

23. The work that my son does for Glass and Metal Solutions, Inc. is different than the work he did for Glass Fabricators, Inc. At Glass Fabricators, Inc., Dale Dotson Jr. was a

union apprentice, learning the glass trade of fabricating and manufacturing glass products and installing the glass products that were fabricated and manufactured by Glass Fabricators, Inc. Dotson Jr. is not a fabricator for Glass and Metal Solutions, Inc. because Glass and Metal Solutions, Inc. does not do fabrications. For Glass and Metal Solutions, Inc. Dale Dotson Jr. does site survey-at job sites and coordinates the project which involves the low-level installation of glass products delivered to the job site by others. Dotson Jr. also works on installing the glass using simple hand tools at Glass and Metal Solutions, Inc. unlike the heavy equipment used to install the high-level glass products fabricated by Glass Fabricators, Inc.

24. Glass and Metal Solutions, Inc. has never been a part of the Construction Employers Association (CEA). Glass and Metal Solutions, Inc. has never had a contract with any Union (including Local 181 of District Council 6, Painters and Allied Trades).

25. In 2015 Glass and Metal Solutions, Inc. worked on some small items for approximately five (5) of the many companies that Glass Fabricators, Inc. had worked for. However, those odd jobs were small scale, low level jobs such as, for example, replacing a broken piece of glass, and were nothing like the large scale high level work of fabricating, manufacturing and installing glass products that Glass Fabricators, Inc. had been in the business of doing. These odd jobs came about when someone from one of those companies would call my personal cell phone because they happened to know the number. None of the services related to any contracts that they had with Glass Fabricators, Inc.

26. The customers for Glass and Metal Solutions, Inc. are different and the projects are out of the State of Ohio. For Glass and Metal Solutions, Inc. I drive in a pickup truck all over the United States to install glass and metal storefront windows, doors and panels onto low level storefronts using hand tools because I need the work.

Further Affiant sayeth naught.

DALE DOTSON

Sworn to before me and subscribed in my presence this 13th day of July, 2017.

Notary Public

Stephen E. Doucette, Esq.
Notary Public
Attorney Registration No. 0062376
No Expiration

Page 790

669 F.3d 790 (6th Cir. 2012)

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Plaintiff-Appellant,

v.

DORN SPRINKLER COMPANY; Dorn Fire Protection, LLC; Christopher Dorn; David Dorn, Defendants-Appellees.

No. 10-4368.

United States Court of Appeals, Sixth Circuit.

February 28, 2012

Page 791

ON BRIEF:

William W. Osborne, Jr., Natalie C. Moffett, Osborne Law Offices, P.C., Washington, D.C., David M. Cook, Cook, Portune & Logothetis, LPA, Cincinnati, Ohio, for Appellant.

Katherine L. Kennedy, Mannion Gray Co., L.P.A., Ft. Wright, Kentucky, for Appellee.

Page 792

Before: COOK, McKEAGUE, and ROTH, Circuit Judges.[*]

OPINION

McKEAGUE, Circuit Judge.

Plaintiff Road Sprinkler Fitters Local Union No. 669, U.A. AFL-CIO (" Union") filed suit against Dorn Sprinkler Company (" Dorn Sprinkler"), Dorn Fire Protection, LLC (" Dorn Fire Protection"), Christopher Dorn, and David Dorn (collectively " Defendants") alleging, among other claims, breach of an obligation of arbitration arising out of a collective bargaining agreement between Dorn Sprinkler and the Union. The district court granted summary judgment to Defendants, holding that Dorn Sprinkler was not the alter ego of Dorn Fire Protection, and thus, that Dorn Fire Protection did not have an obligation to arbitrate with the Union. The Union appeals. We affirm.

I. BACKGROUND

Dorn Sprinkler was formed in May 1977 and its day-to-day operations were handled by its owner, David Dorn. This dispute arose when Dorn Sprinkler failed to make employer contributions to various benefit funds for three months in late 2006 and early 2007, as required by its collective bargaining agreement with the Union. As a result, the employees of Dorn Sprinkler organized a work stoppage on January 19, 2007 that rendered Dorn Sprinkler unable to continue operations. Subsequently, in March 2007, Dorn Sprinkler went out of business with its required payments to the benefit funds languishing in arrears. Although Dorn Sprinkler originally agreed to arbitrate the Union's grievances, it later refused on the ground that it had gone out of business.

Meanwhile, David Dorn's son, Christopher Dorn, who was lead salesman at Dorn Sprinkler, formed a company called Dorn Fire Protection, Inc. during the 1990s but had not started doing business. In October 2006, shortly before financial troubles surfaced in his father's business, Christopher changed the name of Dorn Fire Protection, Inc. to Dorn Fire Protection, LLC, and began operations.

After the demise of Dorn Sprinkler, the Union submitted a request to arbitrate grievances to Dorn Fire Protection under the theory that it is an alter ego of Dorn Sprinkler. Dorn Fire Protection refused to arbitrate with the Union on the grounds that it was not an alter ego of Dorn Sprinkler and had no contract with the Union. The Union brought this suit to recover, among other things, all losses resulting from Dorn Sprinkler's breaches and prohibited transactions, and to force Dorn Fire Protection to arbitrate the Union's grievances. *Road Sprinkler Fitters Local 669 v. Dorn Sprinkler Co.*, No. 1:07cv650, 2010 WL 1849341, at *2 (S.D.Ohio

May 4, 2010).

The district court, finding that Dorn Fire Protection is not an alter ego of Dorn Sprinkler, granted summary judgment to Defendants. *Road Sprinkler Fitters Local 669*, 2010 WL 1849341, at *5. This appeal followed.

II. ANALYSIS

There is arguably conflicting authority in the Sixth Circuit as to the proper standard of review at the summary judgment level for a district court's determination that one company is (or is not) the alter ego of another. We find that the proper standard is de novo review, and so we

Page 793

review the record afresh. Because the record does not support a finding that Dorn Fire Protection is the alter ego of Dorn Sprinkler, we affirm the district court's decision to grant summary judgment.

A. Standard of Review for Alter-Ego Determinations on Summary Judgment

Ordinarily, this Court reviews a district court's grant of summary judgment de novo. *Trs. of Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 247-48 (6th Cir.2005). Summary judgment is proper where the movant shows there is " no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is " whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Some Sixth Circuit cases have stated that an alter-ego determination is a finding of fact that should be reviewed for clear error—even when reviewing a district court's grant of summary judgment.[1] *SeeDetroit Carpenters Fringe Benefit Funds v. Indus. Contracting Co.*, 581 F.3d 313 (6th Cir.2009). Others apply the ordinary, de novo standard. *E.g.Trs. of Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 247-48 (6th Cir.2005).

Although an alter-ego determination is fact intensive, it is not readily distinguishable from most determinations made on summary judgment. It involves a multi-pronged standard that a district court must apply the facts against in order to interpret. *SeeNLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 336 (6th Cir.1990) (articulating the alter-ego standard as " whether the two enterprises

Page 794

have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership"). On the face of Federal Rule of Civil Procedure 56, there is no apparent reason that the general standard for summary judgment should not apply in alter-ego determinations when they take place at the summary judgment level. *See* Fed.R.Civ.P. 56(a). Further, in considering a motion for summary judgment, courts must view the inferences to be drawn from the underlying facts in favor of the non-moving party. *SeeMatsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. 1348. This drawing of inferences is not conducive to clear-error review. *Cf.id.* Therefore, while clear-error review may be appropriate for alter-ego determinations made later in litigation, de novo review is the appropriate standard where an alter-ego determination was made as part of a decision to grant or deny summary judgment. [2] So, we review the district court's determination that Defendants are entitled to summary judgment de novo.

B. Alter-Ego Status

Where two companies are engaged in the same business in the same marketplace, courts ask " whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership" to decide whether one is the alter ego of the other. *NLRB v. Fullerton*, 910 F.2d 331, 336 (6th Cir.1990) (quoting *Nelson Elec. v. NLRB*, 638 F.2d 965, 968 (6th Cir.1981)). Evidence, or lack thereof, of an employer's intent to evade the obligations of a collective bargaining contract is merely one of the factors to be considered and is not a prerequisite to the imposition of alter-ego status. *Id.* at 337. This has been described as a " more relaxed, less exacting" application of the alter-ego doctrine applied " [i]n order to effectuate federal labor policies." *Id.* The analysis is flexible and " no one element should become a prerequisite to imposition of

alter-ego status; rather, all the relevant factors must be considered together." *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir.1986).

Here, both Dorn Sprinkler and Dorn Fire Protection have the same business purpose and operate in the same marketplace. They both contract to install automatic fire-protection systems for construction projects in Ohio and Kentucky. So we consider the factors listed above in turn.

First, the nature of the management structure in the two companies is not substantially identical. Although the Union suggests that " the same family members who had managed Dorn Sprinkler also managed Dorn Fire Protection," the record does not support this contention. The evidence suggests that (1) Christopher Dorn, who was lead salesman at Dorn Sprinkler is now the owner and President of Dorn Fire Protection; (2) his sister,

Page 795

Amy O'Shaughnessy, was front office manager and bookkeeper at Dorn Sprinkler and is now a bookkeeper at Dorn Fire Protection; and (3) David Dorn was President of Dorn Sprinkler and now does consulting work for Dorn Fire Protection. In light of these differences in management between the two companies, this factor militates against alter-ego status.

The Union relies heavily on the familial relationship between the leadership of the two companies. But even though the characters are the same and are related to one another, this does not necessarily mean the overall nature of management is the same in both companies. *SeeKenmore Contracting Co. v. Int'l Assoc. of Bridge, Structural, & Orn. Iron Workers,* 289 NLRB No. 56 (June 24, 1988). Christopher Dorn is the owner and President of Dorn Fire Protection, but the evidence does not support a finding that he played a managerial role at Dorn Sprinkler. Similarly the evidence shows that David Dorn managed Dorn Sprinkler, but now he has a separate company, D & D Design, which has been hired by Dorn Fire Protection as well as several other companies. The evidence further shows that Amy O'Shaughnessy did not manage either company, that she also has her own fire inspection business now, and that she serves as Dorn Fire Protection's bookkeeper in exchange for the use of office space. None of these situations make the management of these two companies substantially identical. *CompareKenmore Contracting Co.*, 289 NLRB No. 56, 1988 WL 213821 at *2 (finding substantially identical management where child capitalized new business only by virtue of funds from parents who owned original company).

The Union claims that the district court applied a more exacting legal standard than this Court's precedent requires, citing *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 587 (6th Cir.2006). But, in fact, the district court applied a flexible standard precisely like the one required in *Yolton.* It did not require identical ownership or intent to avoid labor laws, but instead considered the nature of the managerial roles at play and considered intent as one factor in its analysis. In *Yolton,* alter-ego status existed where the President and CEO of the original company was also the President and CEO of the second company; furthermore, the Vice President and Treasurer of the original company was also the Vice President and Treasurer of the second company. *Seeid.* at 588. Given the distinguishable facts in this case, the district court would not have had to apply a more exacting standard to find that alter-ego status did not exist here, even though it was not found to exist in *Yolton.*

Next, we consider the operation factor. This factor tends to cut against alter-ego status because, at the outset, the two companies were competitors. When Dorn Fire Protection was started, it rented separate office space from Dorn Sprinkler and attracted customers and employees of its own. Although the Union states that Dorn Fire Protection employed " a number of former employees of Dorn Sprinkler," only two of the fourteen Dorn Fire Protection employees worked for Dorn Sprinkler at or around the time of its closing, showing no real continuity of work force. Accordingly, the two companies' operations are not strongly related.

We also consider the equipment used by each company. The district court determined that the equipment factor also weighed against an alter-ego finding. *SeeRoad Sprinkler Fitters Local 669,* 2010 WL 1849341, at *4. It supported its finding by noting that Dorn Fire Protection had produced evidence to show that the equipment it acquired from Dorn Sprinkler

Page 796

was acquired through arms-length purchases. *Id.* The Union questions this determination, noting that there was no bill of sale for some of the equipment purchased and that Dorn Fire Protection " paid" for some of the tools through a swap for other tools it had purchased from Dorn Sprinkler in the past. However, contrary to the Union's contention that Dorn Fire Protection purchased equipment from Dorn Sprinkler " in commencing operations," the tools in question were acquired after Dorn Sprinkler went out of business, so Dorn Fire Protection began operations with all of its own tools, and in fact only acquired a limited number of tools

and three pickup trucks from Dorn Sprinkler. Moreover, Dorn Sprinkler sold many tools to other contractors and not just to Dorn Fire Protection. Accordingly, the overlap in equipment between the two companies was insubstantial.

Next, we consider the customer base of the two companies. Despite the Union's claim that Dorn Fire Protection's customers " included a number of former Dorn Sprinkler customers," proportionally speaking, this argument is simply not persuasive. Only nine out of Dorn Fire Protection's more than 250 customers were formerly Dorn Sprinkler customers. Moreover, when Dorn Sprinkler went out of business, Dorn Fire Protection completed only two of the projects that were pending for Dorn Sprinkler and, when asked, declined to complete another. However, several other contractors picked up where Dorn Sprinkler left off on other projects pending at that time. Thus, the customer factor also suggests Dorn Fire Protection is not an alter ego of Dorn Sprinkler.

Finally, there is no evidence of intent on the part of the two companies to avoid the effect of the collective bargaining agreement. Although the Union insinuates that Christopher left as a result of his father's decision to withhold funds from the benefit fund— with the implied purpose of avoiding the effect of the collective bargaining agreement— the record does not support that inference. Apart from this insinuation, the Union does not suggest that there is evidence of intent. Instead, it argues that the district court overly relied on the absence of intent when making its determination. However, the short paragraph mentioning this factor and stating that the lack of evidence of intent merely " weighs against a finding of an alter ego" belies the Union's argument. The district court did not err simply by noting and considering the lack of evidence of intent. *SeeFullerton,* 910 F.2d at 337.

III. CONCLUSION

Accordingly, upon de novo review, we AFFIRM the district court's grant of summary judgment in favor of Defendants.

Notes:

[*] The Honorable Jane R. Roth, Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

[1] The *Detroit Carpenters* decision imported the language about clear error review from another Sixth Circuit decision, *Yolton v. El Paso Tennessee Pipeline Co.,* 435 F.3d 571 (6th Cir.2006). In *Yolton,* the panel was not reviewing a grant of summary judgment, but rather the grant of a motion for a preliminary injunction in which the district court concluded that plaintiffs were likely to succeed in their attempts to establish that one company was the alter ego of another. *Seeid.* at 589. In turn, *Yolton* derived the clearly erroneous standard of review from *NLRB v. Allcoast Transfer, Inc.,* 780 F.2d 576 (6th Cir.1986). But *Allcoast* dealt with the review of a decision by the National Labor Relations Board, in which the panel stated " [a] determination of alter ego status is a question of fact ... and therefore the Board's conclusion must be enforced if supported by substantial evidence." *Seeid.* at 579. This genealogy of the " clearly erroneous" standard that was articulated in *Detroit Carpenters* reveals that it was misplaced. However, the analysis in *Detroit Carpenters* further reveals that the panel in that case engaged in de novo review of the legal issues involved, reversing the decision of the district court to grant summary judgment because its analysis " did not stand up to *de novo* review." *Detroit Carpenters Fringe Benefit Funds,* 581 F.3d at 319. Thus, the language articulating a clear-error standard of review is merely dicta, which will not bind subsequent panels. *See* Sixth Cir. Rule 206(c) (stating that one panel of this Circuit may not overrule a prior panel's published opinion). Nevertheless, the clear-error standard has crept into the analysis of unpublished decisions of this Circuit. *SeeLaborers Pension Trust Fund-Detroit & Vicinity v. Interior Exterior Specialists Constr. Grp., Inc.,* 394 Fed.Appx. 285, 288 (6th Cir.2010) (per curiam) (stating that, although judgment as a matter of law is normally reviewed de novo, alter-ego status is " a question of fact to be reversed only if clearly erroneous").

[2] Other circuits apply ordinary summary judgment analysis when reviewing a district court's grant or denial of summary judgment based on an alter-ego determination. *SeeFlynn v. R.C. Tile,* 353 F.3d 953, 957-60 (D.C.Cir.2004) (reviewing grant of summary judgment de novo); *Occidental Fire & Casualty Co. v. Great Plains Capital Corp.,* 168 F.3d 500 (9th Cir.1999) (unpublished table decision) (same); *Langone v. William Walsh, Inc.,* 101 F.3d 106 (1st Cir.1996) (unpublished table decision) (reviewing de novo, and also acknowledging the fact-intensive nature of the alter-ego inquiry, but affirming denial of summary judgment based on the plaintiff's submission of sufficient facts to establish alter-ego status); *see alsoHamilton v. Water Whole Int'l Corp.,* 302 Fed.Appx. 789, 792-94 (10th Cir.2008) (discussing whether there existed a genuine issue of material fact as to whether defendants are alter egos of one another); *Operating Eng'rs Local No. 101 Pension Fund v. K.C. Excavating & Grading, Inc.,* 57 Fed.Appx. 273 (8th Cir.2003) (same).

DAIMLER TRUCKS NORTH AMERICA LLC PAGE 10
4747 N CHANNEL AVE, PO BOX 3849, PORTLAND, OR 97208-3849

0VEHICLE ID: 3AKJGED58GDGY9902 INVOICE NO.....P61365
VEH S/N: GY9902 INVOICE DATE.....05/24/15

0			FUEL TANK(S) & EQUIPMENT	
0	252	206-154	80 GALLON/302 LITER ALUMINUM FUEL TANK - RH	STD
	253	201-998	NO RH AUXILIARY FUEL TANK	STD
	254	204-152	70 GALLON/264 LITER ALUMINUM FUEL TANK - LH	-52.00
	255	200-998	NO LH AUXILIARY FUEL TANK	STD
	256	230-998	NO BETWEEN RAIL FUEL TANK	STD
	257	203-998	NO HYDRAULIC OIL TANK	STD
	258	218-006	25 INCH DIAMETER FUEL TANK(S)	STD
	259	215-005	PLAIN ALUMINUM/PAINTED STEEL FUEL/HYDRAULIC TANK(S) WITH PAINTED BANDS	STD
	260	212-008	FUEL TANK(S) AFT	STD
	261	231-998	NO FUEL TANK MTG BETWEEN RAILS	STD
	262	232-510	10 GALLONS ADDITIONAL FUEL	100.00
	263	664-001	PLAIN STEP FINISH	STD
	264	207-998	NO FUEL TANK SCREENS	STD
	265	205-001	FUEL TANK CAP(S)	STD
	266	210-998	NO FUEL TANK DRAIN VALVES	STD
	267	220-998	NO FUEL HEATER	STD
	268	122-1F1	DAVCO 482 FUEL/WATER SEPARATOR	469.00
	269	216-020	EQUIFLO INBOARD FUEL SYSTEM	STD
	270	20E-998	NO AUXILIARY FUEL SUPPLY AND RETURN PORTS	STD
	271	202-016	HIGH TEMPERATURE REINFORCED NYLON FUEL LINE	STD
	272	213-998	NO FUEL LINE INSULATION	STD
	273	221-998	NO FUEL COOLER	STD
0			TIRES	
0	274	093-2F8	GOODYEAR G399A LHS FUEL MAX 295/75R22.5 14 PLY RADIAL FRONT TIRES	STD
	275	094-2GG	GOODYEAR G572A LHD FUEL MAX 295/75R22.5 14 PLY RADIAL REAR TIRES	552.00
	276	095-998	NO PUSHER/TAG TIRES	STD
0			HUBS	
0	277	418-054	CONMET PRESET PLUS ALUMINUM FRONT HUBS	STD
	278	450-054	CONMET PRESET PLUS ALUMINUM REAR HUBS	STD
	279	449-998	NO PUSHER OR TAG HUBS	STD

ADF, Inc., and its alter ego ADLA, LLC *and* International Brotherhood of Teamsters, Local Union No. 251. Case 1–CA–45068

February 26, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 4, 2009, Administrative Law Judge Arthur J. Amchan issued the attached decision. Anthony DelFarno, appearing pro se for the Respondents, filed exceptions in the form of a letter. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief to the Respondents' exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, ADF, Inc. and its alter ego ADLA, LLC, Pawtucket, Rhode Island, their agents, successors, and assigns, shall take the action set forth in the Order.

Elizabeth A. Vorro, Esq., for the General Counsel.
Anthony DelFarno, pro se, of Pawtucket, Rhode Island, for the Respondents.
Elizabeth Wiens, Esq. (Gursky Law Associates), of North Kingston, Rhode Island, for the Charging Party.

---

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondents' exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful review of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit.

[3] In adopting the judge's alter ego finding, we find it unnecessary to pass on whether there is substantial identity of ownership based on the relationship of the unmarried cohabitating owners of ADF and ADLA, in light of the record evidence that ADF Owner Anthony DelFarno controls the overall operations and finances of ADLA. See, e.g., *Omnitest Inspection Services,* 297 NLRB 752 (1990), enfd. 937 F.2d 112 (3d. Cir. 1991) (alter ego status found where the owner of the first entity owned only 20 percent of the second entity, but he effectively controlled the second entity's overall and daily operations); *Rogers Cleaning Contractors, Inc.*, 277 NLRB 482, 488 (1985), enfd. 813 F.2d 795 (6th Cir. 1987) (alter ego status found where the first entity's sole owner dominated the second entity but held no ownership interest in it).

Further, in affirming the judge's decision to draw certain adverse inferences against the Respondents, Member Schaumber finds this case factually distinguishable from *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004), a case in which he dissented in relevant part. Like the present case, *McAllister Towing* involved an administrative law judge's application of adverse inferences against an employer based on the employer's asserted noncompliance with subpoenas issued by the General Counsel. In Member Schaumber's view, however, the judge in *McAllister Towing* did not establish a sufficient record for the Board's review to substantiate her finding of noncompliance, or to justify the drawing of adverse inferences based on such noncompliance. In this case, by contrast, the judge created a detailed record of the Respondents' noncompliance and ruled on the appropriateness of sanctions only after: (1) considering the documents produced by Respondents at the hearing; and (2) allowing Respondents a full opportunity to explain their failure to substantially comply. In these circumstances, Member Schaumber finds that the judge's adverse inferences are supported by the record.

[4] We shall amend the judge's recommended remedy to require that: (1) backpay resulting from the Respondents' failure to apply the collective-bargaining agreement to unit employees (other than Dennis Barr) shall be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and (2) the Respondents shall pay all contractually required fringe benefit fund contributions not paid since January 2009, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979), and make all unit employees whole for any expenses resulting from the failure to make such contributions, with interest, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

In his limited exceptions and supporting brief, the General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary award. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Cardi Corp.*, 353 NLRB 966 fn. 2 (2009); *Rogers Corp.*, 344 NLRB 504, 504 (2005).

The General Counsel has also excepted to the judge's deferral of the issue of DelFarno's individual liability to the compliance stage of these proceedings. We note that matters of individual liability are routinely addressed during the compliance phase of unfair labor practice proceedings, and we find no merit in the General Counsel's exception.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Pawtucket and Providence, Rhode Island, on July 13, and August 24–25, 2009. Teamsters Local 251 filed the initial charge in this matter on November 21, 2008. The General Counsel issued his complaint on April 30, 2009.

The essence of this case is the General Counsel's allegation that ADF has repudiated its obligations under a collective-bargaining agreement with Local 251 by operating ADLA as an alter ego.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

ADF, a corporation, operated a flatbed trucking business with an office in Warwick, Rhode Island, at least until late 2008. Annually, ADF, at least through 2008, purchased and received goods within Rhode Island, valued in excess of $50,000 from points outside of Rhode Island. Annually, at least through December 31, 2008, ADF provided flatbed trucking services valued in excess of $50,000 directly to entities that are directly engaged in interstate commerce. ADF admits and I find that in 2008 ADF was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). The Union, Teamsters Local Union No. 251, is a labor organization within the meaning of Section 2(5) of the Act.

In 2008, ADLA, then located at the same address as ADF in Warwick, Rhode Island purchased six Freightliners tractors, valued at $385,000 from Financial Federal Credit, Inc., of Teaneck, New Jersey, and transported these trucks from New Jersey to Rhode Island.[3] Three of these trucks are registered in the State of New Hampshire. ADLA subcontracts work to Ever Ready Trucking in Massachusetts. One of ADLA's principal customers, Capco Steel, with whom it has done $150,000 in business, has a facility in New Haven, Connecticut. Capco is thus directly engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. ADLA also picks up concrete at Concrete Systems in Hudson, which is either located in Massachusetts or New Hampshire (Tr. 305).[4] I find that ADLA is therefore an employer engaged in commerce within the meaning of the Act.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent ADF was incorporated in Rhode Island in 1990 to engage in the business of transportation of general commodities. Anthony DelFarno has been ADF's president and sole owner for many years. In 2008, ADF operated four flatbed trucks, black in color, primarily transporting steel and construction equipment. ADF's principal place of business was at 99 Jefferson Boulevard in Warwick, Rhode Island. At that location, ADF rented garage and office space from one of its principal customers, Cardi Corporation.

Prior to the fall of 2008, ADLA was a construction, demolition, and construction management company owned by Lisa Lavigne. Lavigne resides with DelFarno several times per week and is the mother of DelFarno's son, who was born in 2007.

DelFarno is a manager and part owner of ADL (Tr. 95). He is also a supervisor and agent of ADLA within the meaning of Section 2(11) and (13) of the Act. ADF provided space to ADLA at its Warwick, Rhode Island location. ADLA did not pay rent to ADF for this space. Prior to January 1, 2009, Lavigne performed work for ADF, primarily making sales calls and doing some bookkeeping work.

The principal employees of ADLA when it was a construction company appear to have been Lavigne's brothers. ADLA has not performed any construction or demolition work in calendar year 2009. There is no indication that ADLA performed any trucking work until late 2008 at the earliest. In 2009, however, ADLA's work has been almost exclusively providing trucking services to former customers of ADF. In February or March 2009, ADLA moved its garage to a location on Pine Street in Pawtucket, Rhode Island. Anthony DelFarno performs ADLA's administrative functions from this location and from his apartment in Cranston, Rhode Island, which he shares with Lavigne.

---

[1] [Certain errors in the transcript have been noted and corrected.]

[2] I decline to credit any of Respondents' self serving testimony. One example of the unreliability of Anthony DelFarno's testimony concerns the issue of his ownership interest in ADLA. In an affidavit given to the NLRB during its investigation of the charges in this matter, DelFarno stated that he was not an owner of ADLA and that he had no ownership interest in ADLA. (Tr. 218.) At the trial, DelFarno testified that he was "a part owner." (Tr. 95.) In his posttrial brief, he described himself as a 45-percent owner of ADLA, LLC.

Another example of the unreliability of DelFarno's testimony concerns ADLA's hiring of drivers. In his February 2009 affidavit, DelFarno denied that he played any role in hiring drivers for ADLA. The record of the instant hearing establishes that the statements in this regard in DelFarno's affidavit are false. (Tr. 174–176.)

Lisa Lavigne's testimony was often evasive and nonresponsive. Moreover, she failed to comply with the General Counsel's subpoena. In her March 2009 affidavit (Exh. R-4), Lavigne stated that ADLA paid ADF to pick up two trucks in New Jersey that ADLA had purchased. However, Lavigne failed to comply with the General Counsel's subpoena (GC Exh. 19), which required the production of whatever evidence she had of such payments. I thus draw the inference that the assertion in her affidavit, that ADLA paid ADF to pick up trucks for it, is false.

[3] ADLA also had the same telephone number as ADF in 2008.

[4] There is no such place as Hudson, Rhode Island.

[5] Thus, ADLA met the Board's jurisdictional standards in 2008 on the basis of direct inflow (the purchase of goods valued at more than $50,000 from outside of Rhode Island) and on the basis of outflow in 2009, *Siemons Mailing Service*, 122 NLRB 81 (1958).

Moreover, to the extent that there is any ambiguity as to whether ADLA or ADF met the Board's jurisdictional standards, it is due to Respondents failure to comply with the General Counsel's subpoenas, such as par. 18, which asked for detailed information regarding both companies' customers, including the dates and places of all work performed.

ADF had a bargaining relationship with Teamsters Local 251 for almost 20 years. In April 2008, ADF signed a collective-bargaining agreement with Local 251, which by its terms ran from April 15, 2008, until April 14, 2011. ADLA does not recognize Local 251 as the collective-bargaining representative of its drivers and has not complied and does not comply with ADF's collective-bargaining agreement with the Union.

By the terms of its collective-bargaining agreement with the Union, ADF was obligated to make payments to the Union's health services and insurance plan. It ceased making these payments in July 2008. In 2008 ADF made none of the payments into the Union's pension fund that were required by the terms of the collective-bargaining agreement. Neither ADF nor ADLA currently make any contribution for health insurance for ADLA drivers nor does either company make any contribution to a pension plan for ADLA drivers. Another specific instance in which the General Counsel alleges that Respondents violated the Act is by laying off employee Dennis Barr in violation of the seniority provisions of the collective-bargaining agreement.[6]

A. ADF and ADLA are Alter Egos

In *Advance Electric,* 268 NLRB 1001, 1002 (1984), the Board set forth the standards to be applied in determining whether two presumably separate employers are alter egos: (a) the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, supervision, and ownership. The most important factor is centralized control of labor relations. *Superior Export Packing Co.,* 284 NLRB 1169, 1175 (1987); *J. M. Tanaka Construction v. NLRB,* 675 F.2d 1029, 1034 (9th Cir. 1982).

While the ownership of ADF and ADLA is not identical, the Board has not hesitated to find alter ego status even though entities had different owners, when the owners were in a close familial relationship, *Fallon-Williams, Inc.,* 336 NLRB 602 (2001). Although, DelFarno and Lavigne are not married, their relationship should be considered equivalent to that of husband and wife for purposes of determining whether ADF and ADLA are alter egos.[7]

Another factor, sometimes stated as "the crucial factor" in applying the alter ego doctrine, is a finding that the older company continued to maintain a substantial degree of control over the business claimed to have been sold to the new entity, *McAllister Bros.,* 278 NLRB 601, 616 (1986). As set forth below, ADF, in the person of Anthony DelFarno, has maintained complete control over the trucking business of ADLA.

Former Board Chairman Battista would have also required the General Counsel to prove an intent to avoid legal obligations under the Act in order to prove alter ego status. However, such intent has never been required by the Board as a necessary element to establish the existence of an alter ego relationship, e.g., *SRC Painting, LLC,* 346 NLRB 707, 720 (2006). In any event, I infer such a motive on the part of Anthony DelFarno in transferring his trucking operation from ADF to ADLA, see, e.g., DelFarno's testimony at Transcript 230. While DelFarno may have had other motives, such as obtaining affordable cargo insurance and workers compensation insurance, a significant incentive in making ADLA a trucking company was to cease compliance with the terms of his collective-bargaining agreement with Local 251.

Anthony DelFarno managed ADF. DelFarno, who is a part owner of ADLA, also manages that company. Lisa Lavigne may be the nominal owner of ADLA, but she plays little, if any, role in its management. She appears to be nothing more than an investor in ADLA's business. Lavigne does not know the names of ADLA's employees, including its drivers. She also does not know the names of ADLA's customers and does not review ADLA revenue documents.

DelFarno, rather than Lavigne prepares bids of work for ADLA. DelFarno, rather than Lavigne, signed the bill of sale for the six trucks ADLA purchased in October 2008.[8] DelFarno maintains ADLA's check register and submitted ADLA's annual report to the State of Rhode Island in 2007 and 2009.

Similarly, DelFarno hired ADLA's truckdrivers. Lisa Lavigne played no role in the hiring process. In fact, there is no evidence that any of the drivers have ever met Ms. Lavigne. DelFarno, rather than Lavigne, controls the labor relations of ADLA. ADLA drivers are directly supervised by Louis Volante, who supervised the drivers who worked for ADF.[9] John Renzi who dispatched ADF drivers, is also the dispatcher for ADLA.

From the standpoint of Respondents' drivers, little changed when ADLA became their nominal employer. However, former ADF employees no longer receive the benefits of ADF's collective-bargaining agreement with the Union and some drivers were switched to the newly purchased white trucks. When in late February 2009, an ADLA check made out to driver Javier Lopez was returned to him by the bank for insufficient funds, DelFarno paid Lopez the amount of the check in cash. This was the same procedure followed by ADF.[10]

[6] In his posttrial brief, the General Counsel informed the court that Dennis Barr died in October 2009.

[7] This case is distinguishable from *US Reinforcing, Inc.,* 350 NLRB 404 (2007). In that case, the Board declined to find the "close familial relationship" the Board requires to overcome the absence of common ownership. DelFarno, unlike Christian Redmond, of US Reinforcing, has an ownership interest in ADLA. Moreover, Denise Herheim, the owner of the alleged alter ego in *US Reinforcing,* appears to have exercised management functions in her company. There is no reliable evidence that Lisa Lavigne manages ADLA in any fashion.

[8] ADF's mechanics prepared several of these trucks for service in late 2008.

[9] I credit the testimony of Brian Priest, a current employee of ADLA, over the contrary testimony of Anthony DelFarno, and find that Louis Volante, was the drivers' supervisor for ADF and is currently the drivers' supervisor for ADLA. Board law recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries,* 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket,* 231 NLRB 500, 505 fn. 22 (1977).

[10] A few weeks earlier Lopez received a check drawn on ADF's account which also was returned. DelFarno paid Lopez in cash on that occasion as well. When Lopez received this check, he was ostensibly

Since late 2008 or early 2009, ADLA has an identical business purpose as did ADF, the trucking of steel and cement products. In 2009, ADLA has not performed any construction or other nontrucking work. Until late March or early April 2009, ADLA operated out of the same facility on Jefferson Boulevard in Warwick, Rhode Island, as did ADF. At least some of its drivers punched the same timeclock that they had punched while working for ADF. Other than the fact that these drivers were no longer benefiting from the ADF'S collective-bargaining agreement with Local 251, the terms and conditions of their employment did not change at all when they became ADLA employees.

ADLA never paid rent to ADF, or apparently to anyone else, for the space it occupied at Jefferson Boulevard. ADLA does not have any customers for its trucking business that were not also trucking customers of ADF. One of ADLA's trucks, a black flatbed manufactured by Kenworth, is one of the trucks used by ADF for the same purpose. This truck is still registered in the name of Anthony DelFarno.

The other ADLA trucks, which are white in color, are engaged in the same business as those formerly used by ADF. They were transported from New Jersey to Rhode Island in October 2008 by drivers then employed by ADF. In sum, ADLA, as a trucking company, is merely a disguised continuance of ADF.

B. Individual Liability of Anthony DelFarno

The General Counsel moved at the hearing to amend his complaint to allege the individual liability of Anthony DelFarno. Respondent objects on the ground that the proposed amendment violates his due-process rights.

Whether the Board will pierce the corporate veil to hold an individual liable for corporate unfair labor practices is governed by the analysis set forth in *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996). Under *White Oak*, the General Counsel must prove both parts of a two-prong test. Id. at 734. Under the first prong, the Board analyzes whether the corporation and the individual have failed to maintain their separate identities. Id. at 735. Under the second prong, the Board analyzes whether third parties may be damaged by this failure—that is, whether "adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." Id. This potential damage to third parties includes "the diminished ability of the [corporation] to satisfy [its] statutory remedial obligations." Id. "The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form." Id. In order to satisfy the second prong, however, the individual alleged to be individually liable must have "participated in the fraud, injustice, or inequity." Id.

Anthony DelFarno resides in an apartment on Independence Way in Cranston, Rhode Island. He also maintains an office in that apartment. The rent and utilities for this apartment are paid out of ADLA accounts. DelFarno also makes court-ordered payments to his wife from ADLA accounts (Tr. 194–195). While he testified that at the end of each year he charges such payments to himself as income, DelFarno provided no documentary evidence to corroborate his testimony. Without such documentation, I do not find credible DelFarno's testimony that he accurately separates personal expenses from business expenses when using the ADLA accounts.

While the General Counsel has the discretion to litigate the issue of personal liability in the initial phase of an unfair labor practice proceeding, the judge has the discretion to defer this issue to the compliance stage of the litigation, *Dauman Pallet, Inc.*, 314 NLRB 185, 211–212 (1994). I will exercise that discretion to defer consideration of Mr. DelFarno's personal liability to the compliance stage for the following reasons:

> Respondent appeared pro se.
>
> Mr. DelFarno was notified of the General Counsel's intention to litigate his personal liability on August 10, 2009; two weeks before the resumption of the hearing.
>
> DelFarno requested a continuance predicated upon the General Counsel's expressed intention to allege personal liability.
>
> Respondent's request for a continuance was denied.
>
> A clearer picture of the factors to be considered in applying the *White Oak Coal* criteria could be developed by enforcement of the General Counsel's subpoena in U.S. District Court. This is particularly true with regard to the issue of whether DelFarno's use of ADLA funds for his personal use has diminished ADLA's ability to satisfy its remedial obligations under the National Labor Relations Act. Thus, I have no sense of how DelFarno's use of ADLA accounts to pay rent, support for his ex-wife, etc. impacts the ability of ADLA to satisfy its obligations under the collective-bargaining agreement.

However, if the General Counsel obtains evidence that Respondents are transferring or misusing the assets of either ADF or ADLA, or both, to avoid satisfying their remedial obligations pursuant to my order in this matter, I will entertain a motion to reopen the record to address the issue of personal liability. This would include any evidence that assets are being transferred for such purposes to such entities as Highway Construction Services in which either DelFarno or Lavigne, or both, have a financial interest (GC Exh. 20).

C. Respondent's Failure to Comply with the General Counsel's Subpoenas

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party, *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004).

On June 25, 2009, the General Counsel served upon DelFarno and Lavigne subpoenas duces tecum ordering them to appear before this judge on July 13, 2009, with a number of documents. Paragraph 10 of the subpoena requested copies of leases or rental agreements entered into by or on behalf of ADF

working for ADLA. In late 2008, several of Lopez' check from ADF "bounced" and DelFarno then paid Lopez the amount of the checks in cash.

or DelFarno for real estate, machinery, equipment . . . or other property between January 1, 2007, and the present. On July 13, 2009, DelFarno testified that he leased two flatbed trucks to ADF. DelFarno also testified that there were leases from him to ADLA. The General Counsel asked DelFarno to provide these leases. He agreed to do so when the trial resumed but never did so.

Despite my order on July 13, 2009, that DelFarno fully comply with the General Counsel's subpoena no later than July 31, 2009, he produced very few additional documents prior to the resumption of the trial on August 24, 2009. On August 24, DelFarno introduced a court order evicting ADF from its premises at 99 Jefferson Boulevard, in Warwick, Rhode Island, as of March 31, 2009.[11] On August 24, DelFarno, for the first time, asserted that he was unable to produce additional documents because he had insufficient time to remove records from 99 Jefferson Boulevard prior to ADF's eviction. I do not find this credible.

Moreover, DelFarno had been on notice as to his obligation to preserve records to defend against the charge that ADF and ADLA were alter egos since service of the initial charge on November 28, 2008. DelFarno gave an affidavit to the General Counsel during the investigation of the charge on February 12, 2009, more than 6 weeks before he was required to move out of 99 Jefferson Boulevard. In sum, even assuming that DelFarno no longer had access to the records covered by the subpoena, this resulted from his own lack of due diligence.

Lisa Lavigne produced none of the documents requested in the subpoena issued to her and signed for by Anthony DelFarno.

In light of the above, I draw the inference that either there were no leases of the trucks from DelFarno to ADF or ADLA, or between ADF and ADLA, or that the leases establish a lack of arms-length transactions between DelFarno and both companies and between ADF and ADLA. Due to Lavigne's failure to comply with her subpoena, I infer, for example, that ADLA did not pay ADF for the services of ADF's drivers in transporting ADLA's white trucks from New Jersey to Rhode Island, as Lavigne claimed at page of her March 19, 2009 affidavit (R. Exh. 4).

D. The Termination of Dennis Barr's Employment[12]

Dennis Barr drove a truck for ADF for 8 years. On December 9, 2008, when he reported to work, ADF's dispatcher, John Rienzi, told Barr there was no work for him. A few weeks later, Anthony DelFarno told Barr he was being laid off. ADF continued to employ driver Brian Priest, who was junior to Barr in seniority, in violation of terms of ADF's collective-bargaining agreement with Local 251.

On January 5, 2009, Barr filed a grievance alleging violation of the seniority provisions of the collective-bargaining agreement. Anthony DelFarno responded to Barr on January 7, 2009.[13] In that letter DelFarno confirmed that he told Barr that he was being laid off. He then mentioned a confrontation Barr had with jobsite supervisor at Capco Steel in New Haven, Connecticut, on June 3, 2008. DelFarno concluded his January 7, letter by stating:

> I would like to change your separation with ADF INC from a layoff to a termination for gross insubordination. I will notify the Rhode Island Department for Unemployed Benefits of my decision.

[GC Exh. 3.]

In June 2008, DelFarno discussed the New Haven incident with Barr. DelFarno told Barr it could never happen again. Barr continued to drive flatbed trucks for ADF until December 9.

Barr applied for unemployment insurance sometime after December 9, 2008, and received unemployment insurance benefits for a while. Then his checks stopped. The Rhode Island Unemployment Insurance Agency informed Barr that ADF claimed that he had been terminated for cause. Eventually his benefits were resumed.

On the basis of this evidence, I conclude that Respondents laid off Barr in violation of the terms of its collective-bargaining agreement with the Union. It did not discharge Barr for cause.

CONCLUSIONS OF LAW

1. Respondents ADF, Inc. and ADLA, LLC are alter egos.
2. Respondents violated Section 8(a) (5) and (1) in repudiating and failing to comply with their collective-bargaining agreement with the Union.

REMEDY

Having found that the Respondents violated the Act, they shall be ordered to cease and desist and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondents rescind the withdrawal of recognition of the Union and continue in full force and effect the terms and conditions of the April 15, 2008, to April 14, 2011 labor agreement and apply them to its drivers. The Board does not require that employees suffer the loss of increases in wages or improvements in benefits or the addition of new benefits under circumstances such as these and I accordingly do not recommend that any increases in wages and improvements in benefits be rescinded. It is further recommended that Respondents make the employees whole for any loss of wages and benefits suffered because of the unfair labor practices, with interest.

The Respondents, having terminated the employment of Dennis Barr in violation of the Act, must pay his estate for any

[11] Since March or April 2009, ADLA's trucks are dispatched from the Capco Steel yard on Pine St. in Pawtucket. DelFarno performs the business of ADLA from that location and from his residence on Independence Way in Cranston, Rhode Island.

[12] At pp. 34 and 43 of his brief, the General Counsel states that Respondents should be ordered to offer reinstatement to driver Javier Lopez, who quit his employment with ADLA in March 2009 (see Tr. 254–255). Thus, it appears that the General Counsel is contending that Javier Lopez was constructively discharged due to Respondents' alleged failure to pay Lopez the compensation which it owed him. I decline to order Lopez' reinstatement because Respondents were not put on notice that the reasons that Lopez left its employment were at issue in this matter.

[13] Barr testified that he did not receive the January 7, 2009 letter directly from DelFarno. He testified that he first saw it at the Local 251 union hall.

loss of earnings and other benefits, computed on a quarterly basis from date of his termination to date of Dennis Barr's death, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondents must also make employees whole for whatever earnings and other benefits were lost as a result of Respondents' failure to comply with the terms of its collective-bargaining agreement with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondents, ADF, Inc. and its alter ego ADLA, LLC, Pawtucket, Rhode Island, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to apply the terms and conditions of the April 15, 2008, to April 14, 2011 labor agreement between ADF, Inc. and the International Brotherhood of Teamsters, Local 251.

(b) Withdrawing and/or repudiating its recognition of the Union as the exclusive collective-bargaining representative of Respondents' truckdrivers.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Respondents shall take the following affirmative actions necessary to effectuate the purposes of the Act.

(a) Immediately recognize the Union as the exclusive collective-bargaining representative of the Respondents' drivers.

(b) Comply with the terms and conditions of its 2008–2011 collective-bargaining agreement with the Union.

(c) On request, bargain with the Union as the exclusive representative of its drivers concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices in the manner set forth in the remedy section of the decision, including, but not limited to, reimbursement for any expenses resulting from Respondents' failure to make the required payments to the Union's fringe benefit funds.

(e) Make the estate of Dennis Barr whole for the loss of wages and benefits resulting from ADF/ADLA's unlawful conduct.

(f) Make all delinquent payments to the Union's fringe benefit funds.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility on Pine Street in Pawtucket, Rhode Island, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since December 9, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail to apply the terms and conditions of our 2008–2011 labor agreement with Local 251 of the International Brotherhood of Teamsters, "the Union," to our drivers.

WE WILL NOT unlawfully withdraw recognition from Local 251 of the International Brotherhood of Teamsters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately recognize the Union as the exclusive collective-bargaining representative of our drivers.

WE WILL make our drivers whole for any loss of earnings and other benefits suffered as a result of our failure to comply with

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

our labor agreement, with interest. This includes reimbursing our drivers for any expenses resulting from our failure to pay required payments to the Union's fringe benefit funds.

WE WILL make the estate of Dennis Barr whole for any loss of earnings and benefits resulting from our unlawful termination of his employment on December 9, 2008.

WE WILL comply with the terms and conditions of the 2008–2011 collective-bargaining agreement with the International Brotherhood of Teamsters, Local 251.

WE WILL make all delinquent payments to the Union's fringe benefit funds.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment.

ADF, INC., AND ITS ALTER EGO ADLA, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BOARD OF TRUSTEES OF THE PLUMBERS, PIPE-FITTERS & MECHANICAL EQUIPMENT SERVICE, LOCAL UNION NO. 392 PENSION FUND, *et al.*,

Case No. 1:13-cv-858

Judge Timothy S. Black

Plaintiffs,

vs.

R. AND T. SCHNEIDER PLUMBING CO., *et al.*,

Defendants.

ORDER (1) GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Doc. 26); AND (2) DENYING DEFENDANT SCHNEIDER PLUMBING CO.'S MOTION FOR SUMMARY JUDGMENT (Doc. 27)

This civil action is before the Court on Plaintiffs' Motion for Summary Judgment (Docs. 26, 29) and the parties' responsive memoranda (Docs. 30, 34), and Defendant Schneider Plumbing Co.'s Motion for Summary Judgment (Doc. 27) and the parties' responsive memoranda (Docs. 32, 35).

I. STATEMENT OF THE CASE

Plaintiffs include the trustees of four multi-employer pension and welfare fringe benefit trust funds, the trustees of an industry promotion trust fund, and a Union.[1] The

[1] Plaintiffs include Board of Trustees of the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 Pension Fund; Board of Trustees of the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 Health and Welfare Fund; Board of Trustees of the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 SUB Fund; Board of Trustees of the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 Education Trust Fund; Board of Trustees of the Cincinnati Plumbing and Pipe Fitting Industry Promotion Trust Fund; and Plumbers, Pipefitters & MES, Local Union No. 392 U.A. (the "Union") (collectively "Plaintiffs").

five trust funds were created by the terms of a collective bargaining agreement ("CBA") and trust agreements entered into between the Union and the Mechanical Contractors Association of Cincinnati, a multi-employer association that included Defendant R. and T. Schneider Plumbing Co. ("R&T"). The CBA requires employers to submit monthly reports of hours worked by covered employees, make contributions to the Pension, Health and Welfare, and SUB trust funds at fixed rates per employee-hour paid, make contributions to the Education and Industry Promotion trust funds at fixed rates per employee-hour worked, and deduct specified percentages from employees' wages for Union dues. R&T, owned by Tom Schneider, complied with these requirements until it ceased operations in June 2013. Contemporaneously, Defendant Schneider Plumbing Co. ("SP") began operations and considered itself a non-union company not bound by the CBA. SP is owned by Janine, Todd, and Casey Schneider, former employees of R&T and the wife and sons of Tom Schneider, RT's owner.

Pursuant to section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and sections 502 and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132, 1145, Plaintiffs filed suit against R&T and SP, alleging that R&T has breached the CBA and that SP is bound by the CBA as the successor and alter ego of R&T. Plaintiffs seek to compel submission of the monthly reports and recover unpaid contributions and wage deductions, along with liquidated damages, "for all months subsequent to June 2013." (Doc. 1).

R&T did not respond to the complaint or otherwise defend in this action. Accordingly, the Court entered default judgment as to liability against R&T on June 11,

2014. (Doc. 21). SP timely answered, and the parties commenced discovery. Subsequently, counsel entered an appearance on behalf of R&T and informed the Court at a status conference that R&T had dissolved and that counsel's participation was limited to facilitating discovery. (Doc. 22).

II. UNDISPUTED FACTS

A. Plaintiffs' Undisputed Facts[2]

1. The Board of Trustees of the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 Pension Fund; the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 Health & Welfare Fund; the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 SUB Fund; the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 Education Trust Fund; and the Cincinnati Plumbing and Pipefitting Industry Promotion Trust Fund (collectively "Trust Funds") are authorized to administer the Trust Funds, which receive contributions from numerous employers pursuant to a Collective Bargaining Agreement ("CBA") between the employers and the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 ("Union"). (Doc. 29, Ex. 2 at Art. VIII).

2. Prior to its dissolution in July 2013, Defendant R. and T. Schneider Plumbing Co. ("R&T") was an employer engaged in an industry affecting commerce that agreed to be bound by the provisions of the CBA negotiated between the Union and the Mechanical Contractors Association of Cincinnati ("MCA"). (*Id.*, Ex. 3 at 14).

3. Through the CBA, signatory employers also became bound by the provisions of the Agreements and Declarations of Trust, which created the Trust Funds, the Education Fund, and the Industry Fund (the "Trust Agreements"). (*Id.*, Ex. 2 at Art. VIII).[3]

4. Pursuant to the provisions of the CBA and Trust Agreements, signatory employers were required to submit monthly reports of hours worked by its employees within the Trade and Territorial Jurisdiction of the Union. (*Id.*)

5. For each hour worked, signatory employers were required to pay contributions to the Trust Funds at the negotiated rates in the CBA for hours worked by its employees within the Trade and Territorial Jurisdiction of the Union. (*Id.*)[4]

---

[2] *See* Doc. 29, Ex. 1 and Doc. 32, Ex. 1.

[3] The parties have not filed the Trust Agreements as part of the record.

6. Pursuant to the provisions of the CBA, signatory employers were required to deduct 2.25% of paid wages for Union dues plus an additional 2.5% check-off for the Local No. 392 Equality and Stabilization Program (hereinafter referred to as "check-off deductions"). Check-off deductions are required to be received or postmarked on or before the 15th day (or the first legal banking day thereafter) of the calendar month following the calendar month during which the work was performed. (*Id.* at Art. VII, § 4).[5]

7. Pursuant to the provisions of the CBA, signatory employers were required to deduct 8% of paid wages for submission to the Union administered Vacation & Savings Plan. (*Id.* at Art. VIII, § 6(a)).

8. Contribution Reports, contributions, check-off deductions and Vacation & Savings Plan deductions were required to be received or postmarked by the bank on or before the 15th day (or the first legal banking day thereafter) of the calendar month following the calendar month during which the work was performed. (*Id.* at Art. VIII, § 9).

9. Pursuant to the CBA, and the Trust Agreements, signatory employers who failed to submit their monthly Contribution Reports and contributions to the Trust Funds on a timely basis were responsible for the payment of liquidated damages equal to 8% of the amount unpaid plus any reasonable attorney's fees and costs of enforcing the payment of any contributions to the Trust Funds. (*Id.*)

10. Pursuant to the Evergreen Clause in the CBA, signatory employers agreed to be bound by successor CBAs, unless 60 days prior to the expiration date the Union or signatory employer gave notice of its intent to modify or terminate the CBA. (*Id.* at Art. XVII, § 18).

11. In 1986, Tom Schneider ("Tom") and Robert Schneider began operating R&T. (*Id.*, Ex 3 at 8).

12. R&T performed both repair and construction plumbing work for residential and commercial clients. (*Id.* at 9-10).

13. Tom became the sole owner of R&T in 1993 or 1994. (*Id.* at 11).

14. Around 1993-1994, Tom ran the day to day operations of R&T and was the sole plumber working in the field for the company. (*Id.* at 15).

---

[4] Plaintiffs have not identified the applicable rates.

[5] Plaintiffs' proposed statement of fact that the CBA requires a 4% check-off deduction for the Equality and Stability Program is not supported by the cited portion of the CBA.

15. Janine Schneider ("Janine"), Tom's wife, worked as a secretary for R&T, and in the mid-to-late 1990s, began to take on more responsibility for financial matters, such as accounts receivable, accounts payable, payroll, and meeting with accountants. (*Id.*, Ex. 4 at 13, 19-21).

16. From 1990 until June 2013, R&T operated out of Tom's and Janine's home at 7867 Foxtrot Drive, North Bend, Ohio 45052. (*Id.*, Ex. 3 at 12, Ex. 4 at 6, 15-16).

17. Around 2009, R&T began leasing a garage on Harrison Street and Morgan Road (hereinafter referred to as the "Harrison Street Garage") to store vehicles, tools, and leftover material from other jobs. (*Id.*, Ex. 3 at 24-27).

18. Tom and Janine have four sons: Todd Schneider ("Todd"), Casey Schneider ("Casey"), Tommy Schneider ("Tommy"), and Jake Schneider ("Jake"). (*Id.*, Ex. 4 at 8).

19. Todd began working for R&T as an apprentice in 1999. Todd received his journeyman's card in 2004, after five years in the Local 392 Apprenticeship Program. (*Id.*, Ex. 5 at 7-8, Ex. 7).

20. Casey began working for R&T as an apprentice in 2001 or 2002. Casey received his journeyman's card five years afterward and began working for R&T as a journeyman plumber in 2006 or 2007. (*Id.*, Ex. 6 at 8-9, Ex. 7).

21. Scott DeGolyer ("Scott") worked as a journeyman plumber for R&T for many years until its dissolution in June 2013. (*Id.*, Ex. 4 at 40, Ex. 7).

22. Ryan Keller worked for R&T as a helper. (*Id.*, Ex. 4 at 41; Doc. 35-5 at ¶ 2).

23. Jon Schneider, the cousin of Todd and Casey, also worked for R&T as a helper. (Ex. 4 at 40-41, Ex. 5 at 18; Doc. 35-4 at ¶ 2).

24. R&T used the same telephone number until it ceased doing business on June 15, 2013. (Doc. 29, Ex. 4 at 7).

25. Beginning in the mid-1990s, all of R&T's invoices identified the company name as "Schneider Plumbing." (*Id.*, Ex. 3 at 18-19, Ex. 4 at 18, Ex. 8).

26. From the early 1990's until June 2013, R&T did business as "Schneider Plumbing." (*Id.*, Ex. 3 at 17-19).

27. R&T's vans and Tom's business cards displayed the name "Schneider Plumbing." (*Id.* at 19, 37).

28. R&T advertised in the Cincinnati Bell Yellow Pages as "Schneider Plumbing." (*Id.*, Ex. 20).

29. Since the mid-to-late 1990s, Janine was the sole individual in charge of R&T's financial operations. (*Id.*, Ex. 4 at 13, 18-19).

30. R&T maintained its only bank account with Cincinnati Federal Savings and Loan. (*Id.* at 20).

31. Janine was in charge of corresponding and submitting payments to the Yellowbook for advertising and was responsible for R&T maintaining liability insurance with Iori Insurance Company and workers compensation policy with Frank Gates. (*Id.* at 24-25, 30, 101).

32. Janine handled R&T's correspondence and payments with the individuals in the Fund Office at the Union for contributions and Contribution Reports. (*Id.* at 31-32).

33. Tom, Todd, Casey, and Scott worked in the field performing plumbing work and corresponding with the customers. Every morning, Todd, Casey, and Scott would go to the Harrison Street Garage to receive their assignments from Tom. (*Id.*, Ex. 6 at 18-19).

34. Todd mostly handled commercial plumbing assignments and Casey and Scott were more focused on the residential side of the business. (*Id.* at 22).

35. R&T's main customers were Carew Tower, Millennium Hotel, Covington Holiday Inn, Cincinnati Marriot, Covington Marriot, the Hilton, and Sky-Line Chili. (*Id.*, Ex. 3 at 39-40, Ex. 5 at 14-15).

36. R&T paid for Todd's cell phone, number while he worked at R&T. In certain circumstances, customers would contact Todd directly at this number. (*Id.*, Ex. 5 at 13-14).

37. Customers sometimes contacted Casey on his cell phone, which was paid for by R&T. (*Id.*, Ex. 6 at 13-14).

38. R&T's The phone numbers of R&T, Todd, and Casey's number were all provided by R&T through Cincinnati Bell. (*Id.*, Ex. 4 at 22, Ex. 6 at 13-14).

39. The two main suppliers of materials to R&T were Keidel Supply and Ferguson Supply and R&T had accounts on file with both suppliers. (*Id.*, Ex. 4 at 21-22).

40. Janine handled paying R&T's bills from suppliers. (*Id.* at 70-72).

41. R&T also owned and stored a number of tools in the Harrison Street Garage, including jaw sets, large/medium sewer machine, a jetter, an electric hammer, a curl press, and hand tools. (*Id.*, Ex. 3 at 26, 28, Ex. 9, Ex. 14 at ¶ 8).

42. R&T owned a 2005 Commercial Trailer and three vehicles: (1) 2007 Chevrolet Express; (2) 2008 Ford F350; and (3) 2002 Ford E350. (*Id.*, Ex. 10).

43. In December 2012, Tom was laid off from R&T. (*Id.*, Ex. 3 at 29).

45. Beginning in December 2012, Todd, Casey, and Scott would meet at the Harrison Street Garage every morning, and decide among themselves how to assign the work. (*Id.*, Ex. 5 at 17-18, Ex. 6 at 21-22).

46. Around April 2013, Todd and Casey began to discuss opening their own business. Todd and Casey met with Jim Higgins, Business Agent for the Union, to discuss their options with respect to the Union and whether they could open a new company and take a two year leave of absence from the Union. Higgins informed Todd and Casey that was not an option. Two days after meeting with Higgins, Todd and Casey met with Janine and the three decided to open their own non-union plumbing company. (*Id.*, Ex. 5 at 19-26, Ex. 6 at 30-33).

47. Todd learned that R&T was in bad financial condition. R&T ultimately ceased operations on June 15, 2013. (*Id.*, Ex. 4 at 70, Ex. 5 at 22-26).

48. On April 5, 2013, Defendant Schneider Plumbing Co. ("SP") was officially incorporated with the State of Ohio. (*Id.*, Ex. 11).

49. SP is owned by Todd, Casey, and Janine. Todd and Casey each own 24.5% and Janine owns 51% of SP. (*Id.*, Ex. 4 at 129-30).

50. SP is a commercial and residential plumbing service company. (*Id.*, Ex. 5 at 55-56).

51. SP has employed Todd, Casey, Janine, Scott, Jon Schneider, Jake Schneider, Ryan Keller, and Alissa Schneider. (*Id.*, Ex. 4 at 75, Ex. 5 at 56, Ex. 6 at 40-41).

52. With SP, Todd assigns out work for each morning, places phone calls to customers, visits potential customers to provide bids or estimates, and performs other work in the office. When necessary, Todd works in the field supervising jobs or performing plumbing work himself. (*Id.*, Ex. 5 at 36-38, Ex. 6 at 45, 57-58).

53. Casey continues to perform plumbing work for SP and makes the same hourly wage of $29.50 with SP that he made with R&T, but Casey has shifted from primarily working as a plumber on residential jobs with R&T to working remodels and as a foreman on commercial jobs with SP. (*Id.*, Ex. 6 at 44-45, 50, 54).

54. From June 2013 to approximately September 2013, Janine handled all accounts receivables, accounts payable, and general accounting functions for SP. Alissa began performing all administrative functions for SP in approximately September 2013 and Janine ceased all involvement with administrative functions by November 1, 2013. (*Id.*, Ex. 4 at 75-76, Ex. 5 at 34-36).

55. Scott Degolyer, a former journeyman plumber for R&T, has been a journeyman plumber for SP since June 2013. (*Id.*, Ex. 5 at 56, Ex. 6 at 40, Ex. 12).

56. Jon Schneider, a former helper for R&T, began working and receiving payment for SP on June 8, 2013 as a helper and now works as an apprentice plumber. (Ex. 4 at 78, Ex. 12; Doc. 35-4 at ¶¶ 2-5).

57. Ryan Keller, a former helper for R&T, began working and receiving payment for SP as a helper on June 8, 2013. (Doc. 29, Ex. 4 at 78, Ex. 12; Doc. 35-5 at ¶¶ 2-4).

58. Alissa Schneider, Todd's wife, began working and receiving payment for SP on June 8, 2013 and began to assume full control over the accounts receivables, payroll and financial functions for SP from September 2013 to present. Alissa is the only current employee at SP who didn't formerly work at R&T. (Doc. 29, Ex. 4 at 76-77, Ex. 5 at 34-36, 56, Ex. 6 at 41, Ex. 7, Ex. 12).

59. At the time R&T ceased operation on June 15, 2013, R&T employed Todd, Casey, Janine, Scott, Ryan, and Jon. Subsequently, all six began working for SP on June 16, 2013. (*Id.*, Exs. 7, 12).

60. R&T made two separate transfers of $5,500.00 from its bank account to Defendant SP's bank account on June 6, 2013. Janine testified that one of the transfers may have been an error that she later corrected. (*Id.*, Ex. 4 at 81-84, 91-92, Ex. 13, Ex. 18).

61. R&T transferred the 2005 Commercial Trailer, 2007 Chevrolet Express, 2008 Ford F350, and 2002 Ford E350 to SP. (*Id.*, Exs. 9, 10).

62. R&T transferred numerous tools including jaw sets, large and medium sewer machines, jetter, electric hammer, curl press, and hand tools to SP and has not received any payment for them. (*Id.*, Ex. 3 at 28, Ex. 4 at 96, Ex. 14 at ¶ 8).

63. R&T transferred its phone number to SP and that number is now assigned to Alissa's cell phone. (*Id.*, Ex. 4 at 72-73, 99).

64. SP currently maintains its bank account with Cincinnati Federal Savings and Loan. (*Id.*, Ex. 13).

65. Todd still uses the same cell phone number for SP that he used while working for Defendant for R&T. (*Id.*, Ex. 5 at 13).

66. Casey uses the same cell phone number for SP that he previously used while working for R&T. (*Id.*, Ex. 6 at 6-7).

67. SP used R&T's invoices to some extent until December 2013. These invoices included the name "Schneider Plumbing," listed Tom's name and license number, and provided the address as Tom and Janine's house, which was R&T's office. (*Id.*, Ex. 3 at 35, Ex. 4 at 123-29, Ex. 6 at 43-44, Ex. 15).

68. In December 2013, SP began using new invoices for all of its jobs in December 2013. These new invoices listed Todd's name and license number, and provided the address as the P.O. Box purchased by SP. (*Id.*, Ex. 16).

69. Tom and Todd drafted an asset purchase agreement for the sale of the three vehicles and trailer from R&T to SP. The asset purchase agreement listed the blue book value for the vehicles and trailer. However, the agreement was not signed and no payment has been exchanged. (*Id.*, Ex. 3 at 27-28, Ex. 4 at 95, Ex. 5 at 31, Ex. 9).

70. Employees of R&T and SP followed a similar daily routine. Employees would report to the garage each morning to receive their daily assignments before going out into the field. Prior to Tom's retirement in December 2012, Tom assigned all work to R&T employees. Todd has assigned all work to SP employees since the company began operations. Between December 2012 and June 2013, R&T's employees continued to report to the garage each morning, but the work was assigned the work among themselves. (*Id.*, Ex. 3 at 15-16, Ex. 5 at 17-18, 36, Ex. 6 at 21-22, 36).

71. SP is currently using the tools that were previously owned and used by R&T. (*Id.*, Ex. 4 at 97, Ex. 5 at 27, 31-32).

72. SP is currently using the Harrison Street Garage. (*Id.*, Ex. 3 at 27, Ex. 6 at 35).

73. SP took "on all the hard assets . . . within the shop." (*Id.*, Ex. 6 at 35).

74. SP performs work for sixty-seven (67) of R&T's former customers, including all of R&T's largest customers, which includes Carew Tower, the Marriot Hotel in Cincinnati and Covington, the Hilton, the Millennium Hotel, the Covington Holiday Inn and Skyline Chili. (*Id.*, Ex. 4 at 103-22, Ex. 5 at 54, Ex. 17).

75. SP's two main suppliers are Keidel Supply and Ferguson Supply, the same two main suppliers previously used by R&T. SP and R&T also both used Winn Nelson as a supplier, but SP and R&T each used a fourth supplier not used by the other company. (*Id.*, Ex. 3 at 46-47, Ex. 4 at 21-22, Ex. 6 at 58).

76. Defendant SP uses Frank Gates for its worker's compensation policy. (*Id.*, Ex. 4 at 100-01).

77. R&T's tax returns were prepared by Oliver Beringer and so were SP's 2013 tax returns. (*Id.* at 130-31).

78. R&T did not communicate to most of its clients that R&T was closing, but Todd informed R&T's largest customers that he was starting his own plumbing company. (*Id.* at 7, Ex. 5 at 33-34).

79. Customers who called Tom for work shortly after R&T had ceased to perform work were told to call the main phone number used by SP, which was previously the number used by R&T. (*Id.*, Ex. 3 at 43).

80. Tom did not tell Carew Tower that R&T was closing, instead he told them he was retiring. (*Id.* at 39).

81. R&T's bank account was closed on March 4, 2014. (*Id.*, Ex. 18).

82. In the two months after it ceased operations, R&T made several payments to suppliers, its uniform provider, and its advertiser. (*Id.*, Ex. 9).

83. SP began performing work on June 16, 2013, but began paying some employees the week ending June 8, 2013. (*Id.*, Ex. 4 at 77, Ex. 5 at 32, Ex. 12).

84. Pursuant to Appendix E of the CBA, plumbers classified as "Helpers" are considered covered employees under the CBA and part of a separate group of Plumbers and Pipe Fitters Local No. 392. (*Id.*, Ex. 2 at App'x E).

85. Appendix E of the CBA requires that Helpers work under the immediate supervision of a journeyman plumber. (*Id.*)

86. Plumbers for R&T would be assigned to a particular job and might bring a Helper with him to assist in the work. (*Id.*, Ex. 6 at 24-25).

87. R&T did not permit Helpers to work without the supervision of a plumber. (*Id.*, Ex. 3 at 36, Ex. 4 at 41, Ex. 6 at 24-25).

88. Jacob Schneider worked for SP as a Helper for a short period of time. (*Id.*, Ex. 6 at 41).

B. SP's Undisputed Facts[6]

1. R&T Schneider Plumbing Co. ("R&T") was a small plumbing company formed in 1986. (Doc. 29, Ex. 3 at 8).

2. At all times relevant to this lawsuit, Tom Schneider ("Tom") was the sole owner of R&T. (*Id.* at 11.).

3. Tom managed R&T, and his wife, Janine Schneider ("Janine"), performed all financial and administrative functions of R&T. (*Id.* at 15-16, Ex. 4 at 11-13).

5. With R&T, Janine would take calls from potential customers, and relay the information to Tom. Tom would then assign the work to specific employees. (*Id.*, Ex. 3 at 15-16, Ex. 4 at 14, Ex. 6 at 19).

6. Tom was "the boss" of R&T and ran the company's day-to-day operations. (*Id.*, Ex. 4 at 34, Ex. 6 at 22).

7. Tom and Janine's sons – Casey Schneider and Todd Schneider – worked for R&T as plumbers. (*Id.*, Ex. 5 at 7-8, Ex. 6 at 10-11, 50.).

8. Todd and Casey never had any ownership interest in R&T, nor did they have an official management or supervisory role. (*Id.*, Ex. 5 at 10, 11, 41, Ex. 6 at 10- 11).

9. Scott Degolyer also worked for R&T as a plumber. (*Id.*, Ex. 4 at 40).

10. R&T also employed Jon Schneider and Ryan Keller as helpers. (*Id.* at 40-41).

11. In 1999, R&T became a signatory to a collective bargaining agreement with Local 392. (*Id.*, Ex. 3 at 14).

13. In approximately December 2012, R&T's business was very slow, and Tom decided to retire. (*Id.* at 29-31, 37, Ex. 6 at 23).

14. Tom consulted with the Union, who advised him that he needed to cease working for R&T for six months in order to close down the business. (*Id.*, Ex. 3 at 29-31).

15. Tom stopped working for R&T beginning in December 2012. (*Id.*)

16. During his absence, business continued to be slow and R&T had very little work. (*Id.*, Ex. 6 at 23).

18. R&T ceased all active operations by June 15, 2013. (*Id.*, Ex. 3 at 29, 51, Ex. 4 at 70).

---

[6] *See* Doc. 28.

19. Around April 2013, knowing that Tom intended to retire and close R&T, Todd and Casey began to discuss their futures. (*Id.*, Ex. 5 at 18-20, Ex. 6 at 26).

20. Todd and Casey decided to open their own plumbing company and began developing a business plan. (*Id.*, Ex. 5 at 18-20, 25-26).

21. Todd and Casey initially spoke with a representative of the Union to discuss their options with respect to whether their new company would be a union shop or non-union shop. (*Id.* at 23-25, Ex. 6 at 30-32).

22. Todd and Casey ultimately decided to operate their new company as a non-union shop. (*Id.*, Ex. 5 at 23-25, Ex. 6 at 30-32).

23. Todd and Casey wrote separate letters to the Union dated June 14, 2013 that stated in full:

> Todd M. Schneider [Casey P. Schneider] would like to inform those necessary that it has been decided that as of June 15, 2013 R & T Schneider Plumbing Inc. will not be continuing as a contractor for PL PF Local392.
>
> Todd M. Schneider [Casey P. Schneider], personally, will also be leaving Local392. A final remittance report will be filed for June hours on July 15, 2013.

(Doc. 27, Exs. 5-1, 5-2).

24. Counsel for the Union responded in a letter that their termination of the collective bargaining agreement was "untimely under the terms of the agreement." (*Id.*, Ex. 5-3).

25. Schneider Plumbing Co. ("Schneider Plumbing") was incorporated in April 2013. (Doc. 29, Ex. 11).

26. Schneider Plumbing is owned by Todd, Casey, and Janine. (*Id.*, Ex. 4 at 129-30).

27. Tom has never been an owner of Schneider Plumbing nor has Tom ever had any role in the company. (*Id.*, Ex. 3 at 36, 48, Ex. 4 at 133, Ex. 5 at 57).

28. Schneider Plumbing began paying wages to certain employees for the week ending June 8, 2013 and began operations on June 16, 2013. (*Id.*, Ex. 5 at 32, Ex. 12).

29. Schneider Plumbing employs the following individuals: (1) Todd Schneider, (2) Casey Schneider; (3) Scott Degolyer; (4) Ryan Keller; (5) Jon Schneider; (6) Alissa Schneider ("Alissa"); and (7) Jacob Schneider. Schneider Plumbing

continues to compensate Janine even though she has not had a role in the company's day-to-day functions since November 2013. (Doc. 27, Ex. 6 at ¶ 4; Doc. 29, Ex. 4 at 75, Ex. 5 at 57, Ex. 6 at 39).

30. Tom has no involvement in Schneider Plumbing. (Doc. 29, Ex. 3 at 36, 48).

31. Alissa takes any incoming calls for Schneider Plumbing, and Todd assigns projects and prepares bids for new work. (*Id.*, Ex. 5 at 33-36).

32. Casey assists with the management of the company and acts as a foreman on Schneider Plumbing's larger commercial projects. (*Id.*, Ex. 6 at 45, 50).

33. Schneider Plumbing does more commercial and remodel work (as opposed to residential work) than R&T performed. (*Id.* at 51-52).

34. While Janine assisted with some administrative functions during Schneider Plumbing's first few months of operations, she no longer is involved in the day-to-day operations of the company. Instead, Alissa performs the administrative functions, including taking customer calls. (*Id.*, Ex. 4 at 75, Ex. 5 at 33-35).

35. Alissa manages the administrative functions for Schneider Plumbing in a different manner than Janine had for R&T – including obtaining a payroll vendor to handle the company's payroll and utilizing QuickBooks to track the company's accounts receivables and other financial information (rather than performing those functions manually, as Janine had for R&T). (*Id.*, Ex. 5 at 34-35, 56-67).

36. Tom and Todd expect that SP will pay R&T for the three vehicles and trailer SP obtained from R&T. However, no payment has been exchanged. (*Id.*, Ex. 3 at 27-28, 36, Ex. 5 at 30-31, Ex. 6 at 37-38, Ex. 9).

37. R&T's office was located at Tom and Janine's home. Schneider Plumbing operated out of this same location from June to August 20, 2013. On August 20, 2013, SP obtained a P.O. Box as its mailing address and moved its office to Todd's home. (*Id.*, Ex. 3 at 11-12, Ex. 4 at 134-35, Ex. 6 at 41, Ex. 14 at ¶ 11).

38. None of the office equipment used by Schneider Plumbing at its new office was previously used in R&T's office. (*Id.*, Ex. 6 at 42).

39. Schneider Plumbing obtained a new liability insurance policy (through a different insurance company than that used by R&T), a new tax identification number, and a new bank account. (*Id.*, Ex. 4 at 100, 133).

40. Schneider Plumbing signed new contracts with the telephone and utility companies in June 2013. SP used the same accountant from June to September 2013, but then switched to a new accountant. However, SP's original accountant prepared its 2013 tax return. (*Id.* at 131, 133-34, Ex. 5 at 57-58).

41. Schneider Plumbing utilizes the same shop space that R&T previously used, but Schneider Plumbing executed a new lease for the space. (*Id.*, Ex. 5 at 60).

42. Schneider Plumbing has a different logo and different uniforms than those utilized by R&T. (*Id.*, Ex. 3 at 19, 21, Ex. 6 at 53).

43. Schneider Plumbing has focused on growing its commercial and remodeling business, and Todd has worked to grow these aspects of the business. (*Id.*, Ex. 5 at 39-40, Ex. 6 at 51).

44. R&T did not sell or provide its customer list to SP. Sixty-seven of SP's 212 customers were previously customers of R&T. (*Id.*, Ex. 3 at 33, Ex. 4 at 98, 103-22, Ex. 17).

45. R&T did not transfer its excel spreadsheets containing its financial records, computer equipment, or any files to SP. (*Id.*, Ex. 4 at 98-99).

46. SP did not complete any projects that were begun by R&T, nor has Schneider Plumbing collected any payments owed to R&T for work R&T performed.

47. Schneider Plumbing has performed work 212 customers. Sixty-seven of those customers were former customers of R&T, the remaining 145 were not. (*Id.* at 103-122, Ex. 17).

48. Schneider Plumbing notified Plaintiffs in a letter dated March 27, 2014 (more than 60 days prior to the expiration of the collective bargaining agreement on May 31, 2014) that SP did not believe it was bound by the collective bargaining agreement and that, even if it was, SP did not wish to renew the CBA. (Doc. 27, Ex. 5-4; Doc. 29, Ex. 2 at Art. XVII).

III. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

IV. ANALYSIS

Plaintiffs and SP filed cross motions for summary judgment. Plaintiffs argue that SP is bound by the CBA and Trust Agreements signed by R&T under the theories of alter ego, successor liability, and single-employer liability. Accordingly, Plaintiffs contend that SP has breached the CBA by failing to submit the required monthly reports, failing to pay contributions to the Trust Funds for its covered employees, and failing to deduct Union dues from its covered employees' wages. Plaintiffs also seek to recover liquidated damages and attorney's fees under the CBA. SP maintains that it is not bound by the CBA under any theory of successor liability and that R&T's obligations under the CBA terminated pursuant to the one-employee unit rule prior to the date SP began operations.

Courts "interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015). "When collective-bargaining agreements create

pension or welfare benefits plans, those plans are subject to rules established in ERISA." *Id.*

Plaintiffs generally argue that SP is liable for the various unpaid contributions and wage deductions without addressing important distinctions between the nature of those discrete obligations and the entity seeking to enforce each specific obligation.

The Pension Fund, Health and Welfare Fund, SUB Fund, and Education Fund are multiemployer welfare and pension plans governed by ERISA. 29 U.S.C. § 1002(1), (2), (37). Accordingly, the respective boards of trustees, the plans' administrators, seek to recover delinquent contributions pursuant to section 515 of ERISA. *Id.* § 1145.[7]

In contrast, the Industry Promotion Fund exists "for the purposes of promoting the general welfare" of the plumbing industry and "shall not be construed as anything other than an Industry Promotion Fund for the benefit of the employer." (Doc. 29, Ex. 2 at Art. VIII, § 5(a), (d)).[8] Accordingly, the Industry Promotion Fund is not an employee welfare or pension plan governed by ERISA because it exists for the benefit of the employers, not

[7] "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145.

[8] "An industry promotion fund is designed to benefit the industry as a whole and is primarily concerned with the relationship between the industry and the public rather than the relationship between the employed and the employer." *Joint Admin. Comm. of Plumbing & Pipefitting Indus. in Detroit Area v. Washington Grp. Int'l, Inc.*, 568 F.3d 626, 628 (6th Cir. 2009) (internal citations omitted).

the employees. 29 U.S.C. § 1002.[9]

These five Trust Funds were created by the CBA and Trust Agreements, contracts entered into between the Union and the Mechanical Contractors Association of Cincinnati, and seek to recover delinquent contributions allegedly due from SP pursuant to the terms of those documents. An employer bound by the CBA must make contributions to the Trust Funds based on the number of hours that covered employees either work and or receive pay for.

Pursuant to section 301 of the LMRA, the Union asserts that R&T and SP breached the CBA by failing to make deductions from its covered employees' wages for Union dues, the Equality and Stability Plan, and the Vacation & Savings Plan. 29 U.S.C. § 185. The CBA requires employees to deduct 2.25% of paid wages for union dues "in accordance with an individual and voluntary written authorization." (Doc. 29, Ex. 2 at Art. VII, § 4(a)).[10] Together, Plaintiffs seek to hold SP liable for delinquent contributions and wage deductions "for all months subsequent to June 2013." (Doc. 1).

The identity of each Plaintiff and the nature of the obligation it seeks to enforce is important because "it is well-established that ERISA funds are accorded a special status and are entitled to enforce the written contracts, without regard to the understandings or common-law contract defenses of the original parties, similar to a holder in due course in

[9] Plaintiffs implicitly acknowledged this distinction in their complaint (Doc. 1 at ¶ 5), but they do not address it in their briefing on the motions for summary judgment. The Industry Fund's full name, the Cincinnati Plumbing and Pipe Fitting Industry Promotion Trust Fund, is noticeably different than the other four funds, all of which include the full name of the Union.

[10] No written authorizations appear in the record.

commercial law." *Operating Eng's Local 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1053 (6th Cir. 2015). An ERISA "pension or welfare trust is understood to be a third-party beneficiary of a CBA that receives contributions and issues payments negotiated by others." *Cent. States, Se. & Sw. Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 460 (6th Cir. 1989). Due to their third-party beneficiary status, "multi-employer trust funds are entitled to rely on an employer's promises to make contributions to the funds, irrespective of any breach or omission by the union . . . because the funds often are not in a position to know what is going on between the employer and the union, and the union may have interests that differ from or are inimical to the funds' interests." *G & W Const. Co.*, 783 F.3d at 1053 (internal citations omitted).

Section 515 of ERISA "restricts the defenses employers may raise to suits brought to collect delinquent contributions to ERISA funds." *G & W Const. Co.*, 783 F.3d at 1052. The only recognized affirmative defenses are "fraud in the execution of the contract, illegality of contributions, decertification of the union, or termination of the contract." *Id.* at 1053. An employer's "claim that the union has promised not to collect a payment called for by the agreement is not a good answer to the trustees' suit—although it might be a ground on which to obtain damages from the local union." *Behnke*, 883 F.2d at 460 (quoting *Robbins v. Lynch*, 836 F.2d 330, 334 (7th Cir. 1988)). Accordingly, "[a]ny conduct of the Union that is contrary to the written provisions of the agreements cannot affect the Funds' right to collect contributions that are due and owing to the Funds." *G & W Const. Co.*, 783 F.3d at 1053. The Industry Promotion Fund and the Union are not afforded this special status.

A. One-Employee Unit Rule

SP argues that it cannot be bound by the CBA pursuant to the one-unit employee rule. Plaintiffs maintain that R&T and SP both employed more than one employee in the bargaining unit at all relevant times and that, even if there were a one-employee unit, it was not maintained for a sufficient length of time for purposes of the rule.

The parties rely extensively on *Baker Concrete Const. Inc. v. Reinforced Concrete Iron Workers Local Union 372 of Int'l Ass'n of Bridge Structural, Ornamental, & Reinforcing Iron Workers*, No. 1:13-cv-225, 2014 WL 4961488 (S.D. Ohio Oct. 2, 2014), *appeal filed*, No. 14-4102 (6th Cir. argued June 10, 215). As described in *Baker Concrete*, "[w]hen an employer has no intention to employ anyone in the bargaining unit, the one employee unit rule permits employers to repudiate a collective bargaining agreement after only a few months of maintaining a one-or zero-employee unit." *Id.* at 4. SP maintains that R&T's obligations under the CBA terminated in early June 2013 pursuant to the one-employee unit rule. Accordingly, SP argues, there was no existing obligation that could bind SP under any theory of successor liability.

The Court finds that the one-employee unit rule as set forth in *Baker Concrete*, assuming that decision correctly stated the rule and is upheld on appeal, is nevertheless not applicable here for several reasons.

First, the employer in *Baker Concrete* and in all the cases cited therein were construction companies that signed CBAs pursuant to the pre-hire provisions of section

8(f) of the Nation Labor Relations Act. 29 U.S.C. § 158(f).[11] "Section 8(f) explicitly permits employers in the construction industry—but no other employers—to enter into prehire agreements. Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees." *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 230 (1993).[12] The Ninth Circuit in *Westlake*, a case relied upon heavily in *Baker Concrete*, confirms that the existence of a section 8(f) pre-hire agreement is a prerequisite to the application of the one-employee unit rule:

> We hold that *Mesa Verde* [*Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir.1988) (en banc)], which did not involve a one-employee unit, did not affect our prior holding in *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557 (9th Cir. 1984), which did involve a one-employee unit. There we held that "a construction industry employer who employs a single employee pursuant to a Section 8(f) pre-hire agreement is entitled to repudiate the agreement by conduct sufficient to put the union and the employee on notice that the agreement

---

[11] *J.W. Peters, Inc. v. Bridge, Structural & Reinforcing Iron Workers, Local Union 1*, 398 F.3d 967, 974 (7th Cir. 2005); *Laborers Health & Welfare Trust Fund for N. California v. Westlake Dev.*, 53 F.3d 979 (9th Cir. 1995); *Stanker & Galetto, Inc. v. New Jersey Reg'l Council of Carpenters of United Bhd. of Carpenters & Joiners of Am.*, Civ. No. 12-5447, 2013 WL 4596947 (D.N.J. Aug. 28, 2013); *Whiting-Turner Contracting Co. v. Local Union No. 7*, 15 F. Supp. 2d 162 (D. Mass. 1998); *Haas Garage Door Co.*, 308 NLRB 1186 (1992); *Searls Refrigeration Co.*, 297 NLRB 133 (1989).

[12] "Section 8(f) allows unions and employers in the construction industry to enter into CBAs without requiring the union to establish that it has the support of a majority of the employees in the unit covered by the CBA. Along with creating an exception to section 9(a)'s rule that unions must demonstrate a showing of majority support, section 8(f) also is an exception to the NLRA's requirement that the employer is bound to bargain with the exclusive representative even after the contract has expired." *DiPonio Const. Co. v. Int'l Union of Bricklayers & Allied Craftworkers, Local 9*, 687 F.3d 744, 749 (6th Cir. 2012) (internal citation and quotation marks omitted).

> has been terminated." Our decision in *Beck* was "specifically shaped to respond to the unique circumstances of a single-employee bargaining unit in the construction industry."

Westlake Dev., 53 F.3d at 982 (emphasis supplied).

Here, SP does not contend that the CBA is a pre-hire agreement. Another district court in this circuit has also recognized this same distinction and declined to apply the one-employee unit rule. *Payne v. Local Lodge 698*, 856 F. Supp. 2d 915, 923 (E.D. Mich. 2012) ("Plaintiff relies on cases involving 29 U.S.C. § 158(f), which pertains to pre-hire agreements in the construction industry, but these cases only stand for the proposition that the employer is permitted to terminate such an agreement with a single-employee bargaining unit." (citing *J.W. Peters*, 398 F.3d 967; *Westlake*, 53 F.3d 979)).

Second, the one-unit employee rule likely does not affect the enforceability of the CBA for purposes of ERISA. The Seventh Circuit in *J.W. Peters*, another case that involved a pre-hire agreement and was cited extensively in *Baker Concrete*, applied the one-unit employee rule only after distinguishing an earlier decision from that circuit that declined to apply the rule in the ERISA context. *J.W. Peters*, 398 F.3d at 977 (noting that the earlier decision "rested on the statutory language and unique considerations present in the ERISA context, concerns that are not at issue here"). In that earlier decision, the Seventh Circuit held that "the Board's finding that the one-man rule barred a remedy under the NLRA did not resolve the issue of a potential remedy under ERISA. Defenses to the validity of a labor contract and liability under ERISA's section 515 present distinct issues." *Martin v. Garman Const. Co.*, 945 F.2d 1000, 1004 (7th Cir. 1991). Further,

"[t]he one-man rule may remain valid for purposes of unfair labor practice proceedings while counting for naught when the contract is cognizable under ERISA." *Id.* at 1005.

In the ERISA context, this circuit "has permitted limited examination of a contract termination defense, at least if the parties' conduct shows, based on a cursory review, that the contract has been terminated." *G & W Constr.*, 783 F.3d at 1052. However, this limited examination is "superficial" and "sensibly balances the competing interests in avoiding complex litigation that starves a fund's necessary contributions and ensuring that the employer has a legitimate contractual obligation to make employee contributions." *Id.* (quoting *Plumbers & Pipefitters Local Union No. 572 Health & Welfare Fund v. A & H Mech. Contractors, Inc.*, 100 F. App'x 396, 403 (6th Cir. 2004)). Courts may engage in "a classically straightforward inquiry into whether the contract still existed," *id.*, which includes a situation where "an employer sends a timely, unambiguously phrased conditional notice of termination, and where the condition triggering the termination is undisputedly satisfied before a new CBA goes into effect." *Laborers Pension Trust Fund-Detroit & Vicinity v. Interior Exterior Specialists Constr. Grp., Inc.*, 394 F. App'x 285, 292 (6th Cir. 2010). However, the latter decision cautioned that the termination defense is limited to cases "where the relevant facts are not reasonably in dispute" because that "creates little or no more expense or complexity" than the other three cognizable defenses in ERISA section 515 cases. *Id.*[13]

[13] *See also La. Bricklayers & Trowel Trades Pension Fund & Welfare Fund v. Alfred Miller Gen. Masonry Contracting Co.*, 157 F.3d 404, 409 (5th Cir. 1998) ("[I]f the issue of termination cannot be resolved through cursory review, the defense to a section 515 action will not succeed.").

Here, the Court would have to engage in much more than a "limited examination" or "cursory review" to conclude that the CBA was terminated pursuant to the one-employee unit rule. *G & W Constr.*, 783 F.3d at 1052. For example, the parties dispute the threshold issue of whether R&T or SP employed more than one employee in the bargaining unit. Plaintiffs contend there were five employees in R&T's bargaining unit at the time it ceased operations, whereas SP maintains that Scott was the only employee. This disagreement implicates factual disputes and legal issues such as whether Ryan and Jon were helpers who performed the type of work covered by Appendix E to the CBA,[14]

---

[14] In arguing that the one-employee unit rule applies, SP conspicuously made no mention of Ryan or Jon in its motion for summary judgment or memorandum in opposition. (Docs. 27, 30). Only in its reply brief did SP argue that Ryan and Jon, employees SP repeatedly referred to as helpers, were not helpers as defined in Appendix E. (Doc. 35). Additionally, attached to SP's reply brief are affidavits of Todd, Casey, Ryan, and Jon that state that Ryan and Jon did not perform any work covered by Appendix E. (*Id.*, Exs. 2, 3, 4, 5). The affidavits state, in substantially identical terms:

> As Helpers, Ryan and Jon did not perform any plumbing-related tasks as described in Appendix E. Their duties were limited to tasks such as cleaning the shop, retrieving parts or tools, and loading/unloading equipment. Their jobs did not require any specialized knowledge, skills, or experience.

(Doc. 35, Ex. 2 at ¶ 7).

The Court questions whether these affidavits represent legitimate efforts to supplement the summary judgment record or are an attempt to create a sham fact issue. *Aerel, S.R.L. v. PCC Airfoils, LLC*, 448 F.3d 899, 908-09 (6th Cir. 2006). Although the affidavits do not directly contradict deposition testimony, SP attempts to use the affidavits for more than simply revealing information that was not fully explored during those depositions. Tom, Janine, and Casey testified that helpers did not go to jobs on their own and were always assigned with a plumber. (Doc. 29, Ex. 3 at 36, Ex. 4 at 41, Ex. 6 at 24-25). Todd and Casey both testified that SP bills its customers $50 per hour for a helper. (*Id.*, Ex. 5 at 59, Ex. 6 at 24). Casey also testified that an invoice dated July 17, 2013 reflected work done by Jon as an apprentice and Ryan as a helper. (*Id.*, Ex. 6 at 39). However, the Court need not definitely decide whether the affidavits attempt to create a sham fact issue because the one-employee unit rule does not apply even if Ryan and Jon did not perform the type of work covered by Appendix E.

whether Ryan and Jon are excluded from the bargaining unit by way of the Union's failure to enforce the union security clause and require them to become union members,[15] and whether Todd and Casey were excluded from the bargaining unit because neither was an "employee" as defined in section 2(3) of the NLRA, 29 U.S.C. § 152(3).[16] Resolving

---

[15] SP appears to conflate union membership with inclusion in a bargaining unit. The CBA contains a union security clause that tracks the language of section 8(a)(3) of the NLRA. (Doc. 29, Ex. 2 at Art IV, § 1). The congressional authorization for union security clauses in section 8(a)(3) "permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, whether or not the employees otherwise wish to become union members." *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 738 (1988). Here, the CBA requires signatory employers to "utilize employees who, as a condition of employment, shall be required to maintain membership in the Union." (Doc. 29, Ex. 2 at Art IV, § 1). Further, if "an employee fails to tender to the Union the periodical dues and initiation fees uniformly required as a condition of acquiring or retaining membership, the employer will dismiss such employee upon the Union's request." (*Id.*)

Section 8(a)(3) was enacted to address "unions' concerns about 'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason." *Id.* at 749 (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954)). In other words, an employee's inclusion in a bargaining unit is entirely distinct from union membership. SP fails to show why the Union's failure to enforce the union security clause, which in essence permitted Ryan and Jon to be "free riders," results in their exclusion from the bargaining unit.

[16] The Court questions whether it has jurisdiction to make such a determination. SP argues that Todd and Casey were not in the bargaining unit because they were owners, managers, and supervisors of SP and the sons of Janine. Section 2(3) of the NLRA provides that the term "employee" excludes "any individual employed by his parent or spouse" as well as "any individual employed as a supervisor." 29 U.S.C. § 152(3). "Such a person is completely outside the scope of the statute and may not invoke its protection." *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 497 (1985). "In the context of corporations, the Board has limited the § 2(3) exclusion to the children or spouses of an individual with at least a 50% ownership interest." *Id.* at 497 n.7 (citing *Cerni Motor Sales, Inc.*, 201 N.L.R.B. 918 (1973)). Here, it is undisputed that Tom had a 100% ownership interest in R&T and Janine had a 51% interest in SP.

In arguing that Todd and Casey were in the bargaining unit, Plaintiffs conflate the exclusion of an individual employed by his parent from section 2(3)'s definition of "employee" with the NLRB's exercise of its congressionally delegated authority to define the appropriate bargaining unit under section 9(b) of the NLRA. *See Action Auto.*, 469 U.S. at 497-98 & n.7

those issues would require the Court to go far beyond the "limited examination" envisioned in the case law, and potentially invade the exclusive jurisdiction of the NLRB to make bargaining unit determinations or resolve representational issues.

Third, even if the Court accepts SP's contention that R&T and SP had one employee in their respective bargaining units, neither maintained that one-employee unit for the necessary length of time before attempting to repudiate the CBA. *Baker Concrete* observed that "[w]hen an employer has no intention to employ anyone in the bargaining unit, the one employee unit rule permits employers to repudiate a collective bargaining agreement after only a few months of maintaining a one-or zero-employee unit." *Baker Concrete*, 2014 WL 4961488, at *4. Here, SP argues that Todd and Casey were excluded from R&T's bargaining unit starting in June 2013 when they became managers and supervisors of SP. Even when accepting the contention that Scott was the only employee in the bargaining unit in June 2013, the attempted repudiation also occurred in the same month. Specifically, SP maintains that the letters Todd and Casey sent to the Union dated

---

(recognizing the distinction). In exercising its exclusive authority in to select an appropriate bargaining unit, the NLRB "considers a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from a bargaining unit." *Id.* at 495.

Plaintiffs' reliance on *NLRB v. Hubbard Co.*, 702 F.2d 634 (6th Cir. 1983) is unavailing for several reasons. (Doc. 32 at 6-7). First, *Hubbard* involved judicial review of the NLRB's decision to exclude an employee from a bargaining unit because that employee "enjoyed a 'special status' at the workplace which allied his interests with those of management." *Hubbard*, 702 F.2d at 636. SP argues that Todd and Casey fall outside the statutory definition of "employee." Second, the Supreme Court in *Action Auto.* expressly abrogated the rule announced in *Hubbard* and upheld the NLRB's "policy of excluding close relatives of management without a showing of special job-related benefits." *Action Auto.*, 469 U.S. at 493-94. Finally, the cited cases make clear that the NLRB has exclusive jurisdiction to make bargaining unit determinations subject to judicial review in the court of appeals. *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 558-59 (6th Cir. 2013).

June 14, 2013 provided the notice of R&T's intent to terminate or repudiate the CBA. (Doc. 27, Exs. 5-1, 5-2). The rule as set forth in *Baker Concrete* permits employers to repudiate a CBA "after only a few months." *Baker Concrete*, 2014 WL 4961488, at *4 (noting that the employer had not employed a bargaining unit member for almost ten years before repudiating the CBA). Accordingly, the one-employee unit rule cannot apply here.

Finally, neither R&T nor SP provided the requisite notice of repudiation that the one-employee unit rule requires. *Baker Concrete* stated that "repudiation under the one employee unit rule [is] effective 'by conduct sufficient to put the union and the employee [in the single-employee bargaining unit] on notice that the agreement has been terminated.'" *Baker Concrete*, 2014 WL 4961488, at *9 (quoting *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557, 566 (9th Cir. 1984)) (second alteration in *Baker Concrete*).[17] Even when accepting SP's contention that Scott was the only employee in the bargaining unit, SP does not argue or cite any evidence to suggest that Scott received proper notice that the CBA was terminated. *See Elec. Workers Local 58 Pension Trust Fund v. Gary's Elec. Serv. Co.*, 227 F.3d 646, 657 (6th Cir. 2000) ("The repudiation by conduct doctrine typically requires something more than mere breach of the 8(f) contract, in that the employees and the parties must be put on notice that the

[17] The complete quoted sentence from *Beck* reads: "We hold that a construction industry employer who employs a single employee pursuant to a Section 8(f) pre-hire agreement is entitled to repudiate the agreement by conduct sufficient to put the union and the employee on notice that the agreement has been terminated." *Beck*, 746 F.2d at 566. The express reference to a section 8(f) pre-hire agreement reinforces the Court's conclusion that the one-employee unit rule has no application here.

contract was void."). Here, even if the one-employee unit rule could apply, the undisputed facts demonstrate that any attempted repudiation would be ineffective.

Accordingly, for these several reasons, the Court concludes that the one-employee unit rule is not applicable here.

B. Single Employer and Successor Liability

Plaintiffs seek to hold SP liable for breaching the CBA under the single employer doctrine, successor liability, and the alter ego doctrine. These theories and doctrines are closely related and employ similar analyses, but only the alter ego doctrine is applicable to the facts presented here.

The single-employer doctrine applies when "two entities concurrently perform the same function and one entity recognizes the union and the other does not." *Trustees of the Detroit Carpenters Fringe Benefit Funds v. Andrus Acoustical, Inc.*, No. 11-CV-14656, 2014 WL 1746399, at *9 (E.D. Mich. Apr. 30, 2014). This is often referred to as a "double-breasted operation," which exists where "two or more coexisting employers performing the same work are in fact one business, separated only in form." *Trustees of Detroit Carpenters Fringe Benefit Funds v. Indus. Contracting, LLC*, 581 F.3d 313, 318 (6th Cir. 2009). Plaintiffs argue that R&T and SP constituted a single employer between June 1, 2013 and June 15, 2013. However, the undisputed facts demonstrate that R&T and SP did not concurrently operate. Rather, SP began operations the day after R&T closed down. (Doc. 29, Ex. 5 at 32, Ex. 6 at 33-34). Accordingly, the Court finds that single-employer doctrine is not applicable here. *See Distillery, Wine & Allied Workers*

Int'l Union v. Nat'l Distillers & Chem. Corp., 894 F.2d 850, 851 (6th Cir. 1990) (holding that two simultaneously operating companies were a single employer).

Successor liability is similarly not the appropriate framework for the required analysis. The theory of successor liability advanced by Plaintiffs provides that "a purchaser of assets may be liable for delinquent ERISA fund contributions . . . when two elements are established: (1) notice by the buyer of the seller's liability; and (2) sufficient evidence of continuity of operations between the buyer and seller." *Sheet Metal v. Total Air Sys., LLC*, 2014 U.S. Dist. LEXIS 82971, at *22 (N.D. Ohio June 18, 2014) (citing *Einhorn v. M.L. Ruberton Const. Co.*, 632 F.3d 89, 99 (3rd Cir. 2011)). As the Third Circuit noted, "[t]he requirement of notice and the ability of the successor to shield itself during negotiations temper concerns that imposing successor liability might discourage corporate transactions." *Einhorn*, 632 F.3d at 96. The requirement of notice before imposing successor liability presupposes that the predecessor entity incurred the debt or liability prior to the asset sale. *See Sheet Metal*, 2014 U.S. Dist. LEXIS 82971, at *25 (observing that the theory "requires that a successor be put on notice before the assumption of debt follows").

Here, Plaintiffs do not seek to recover from SP for a liability incurred by R&T. Rather, Plaintiffs allege that SP is bound by the CBA and is liable for "unpaid contributions, check-off and wage deductions owed for all months subsequent to June 2013." (Doc. 1). The CBA and Trust Agreements require employers to pay contributions based on the number of hours worked by its covered employees and make deductions from the wages paid to those covered employees. (Doc. 29, Ex. 2 at Arts. VII, VIII). It is

undisputed that no employees worked for or were paid by R&T after June 15, 2013. (*Id.*, Ex. 7). Further, Plaintiffs do not allege that R&T owed any outstanding delinquent contributions or deductions prior to ceasing operations. Accordingly, the Court will proceed to the alter ego analysis to determine if SP was bound by the CBA upon commencing operations.

C. Alter Ego

The alter ego doctrine was developed to "prevent employers from evading obligations under the National Labor Relations Act merely by changing or altering their corporate form." *Trustees of Detroit Carpenters Fringe Benefit Funds v. Indus. Contracting, LLC*, 581 F.3d 313, 317-18 (6th Cir. 2009). "The alter ego doctrine is most commonly used in labor cases to bind a new employer that continues the operations of an old employer in those cases where the new employer is merely a disguised continuance of the old employer." *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331, 336 (6th Cir. 1990).

The test for determining whether two companies are alter egos is "whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership." *Rd. Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Dorn Sprinkler Co.*, 669 F.3d 790, 794 (6th Cir. 2012) (quoting *Fullerton Transfer*, 910 F.2d at 336). "Evidence, or lack thereof, of an employer's intent to evade the obligations of a collective bargaining contract is merely one of the factors to be considered and is not a prerequisite to the imposition of alter-ego status." *Id.* "The analysis is flexible and no one element should become a prerequisite to

imposition of alter-ego status; rather, all the relevant factors must be considered together." *Id.* Notably, this analysis is a "more relaxed, less exacting application of the alter-ego doctrine applied in order to effectuate federal labor policies." *Id.* These factors assist the Court in answering the ultimate question: "whether there was a *bona fide* discontinuance and a true change of ownership or merely a disguised continuance of the old employer." *Allcoast Transfer*, 780 F.2d at 581 (quoting *Southport Petro. Co. v. NLRB*, 315 U.S. 100, 106 (1942)).

The undisputed facts here lend themselves to a comparison with the facts presented in *Dorn Sprinkler*, 669 F.3d 790, which also involved family-owned businesses:

> Dorn Sprinkler was formed in May 1977 and its day-to-day operations were handled by its owner, David Dorn. . . . [I]n March 2007, Dorn Sprinkler went out of business with its required payments to the benefit funds languishing in arrears. . . . Meanwhile, David Dorn's son, Christopher Dorn, who was lead salesman at Dorn Sprinkler, formed a company called Dorn Fire Protection, Inc. during the 1990s but had not started doing business. In October 2006, shortly before financial troubles surfaced in his father's business, Christopher changed the name of Dorn Fire Protection, Inc. to Dorn Fire Protection, LLC, and began operations.

Id. at 792. The court examined each of the alter ego factors in turn and found that they did not support alter-ego status. Here, the undisputed facts weigh so heavily in the other direction that summary judgment for Plaintiffs is appropriate.

As in *Dorn Sprinkler*, Plaintiffs concede that the two entities do not share common ownership. However, R&T and SP do "have the same business purpose and operate in the same marketplace." *Dorn Sprinkler*, 669 F.3d at 794.[18]

The first factor is whether the companies have substantially identical management. In *Dorn Sprinkler*, the court found as follows:

> [E]ven though the characters are the same and are related to one another, this does not necessarily mean the overall nature of management is the same in both companies. Christopher Dorn is the owner and President of Dorn Fire Protection, but the evidence does not support a finding that he played a managerial role at Dorn Sprinkler. Similarly the evidence shows that David Dorn managed Dorn Sprinkler, but now he has a separate company, D & D Design, which has been hired by Dorn Fire Protection as well as several other companies. The evidence further shows that Amy O'Shaughnessy did not manage either company, that she also has her own fire inspection business now, and that she serves as Dorn Fire Protection's bookkeeper in exchange for the use of office space. None of these situations make the management of these two companies substantially identical. *Compare Kenmore Contracting Co.* [*v. Int'l Assoc. of Bridge, Structural, & Orn. Iron Workers*], 289 NLRB No. 56, 1988 WL 213821, at *2 (finding substantially identical management where child capitalized new business only by virtue of funds from parents who owned original company).

Dorn Sprinkler, 669 F.3d at 795. Here, the undisputed facts similarly show that the companies did not have substantially identical management. It is undisputed that Tom

[18] SP notes that it performs more commercial and remodeling work and less residential work than R&T. (Doc. 29, Ex. 6 at 51). Even when the facts are construed in the light most favorable to SP, the record reflects that SP has merely increased the percentage of commercial and remodeling plumbing work it performs as compared to R&T. It is undisputed that R&T previously performed commercial and remodeling same work and that SP continues to perform some residential work. For example, Todd and Casey testified that Todd was always assigned the commercial projects with R&T. (*Id.*, Ex. 5 at 10-11, Ex. 6 at 22). Moreover, SP describes itself as performing "residential and commercial plumbing services" and SP's customer list reflects a substantial number of individual customers with inexpensive bills, which is consistent with the performance of residential work. (*Id.*, Ex. 14 at ¶ 9, Ex. 17).

was the sole manager of R&T prior to December 2012 and that Todd manages SP. (Doc. 29, Ex. 3 at 15-16, Ex. 5 at 36). Plaintiffs repeatedly assert that R&T's management structure between December 2012 and June 2013 is identical to SP's, but the cited deposition testimony does not support these assertions.[19] Todd testified that work was assigned on an ad hoc or collaborative basis among the three plumbers during R&T's last six months of operations:

---

[19] The testimony of Tom and Janine reveal that they lacked personal knowledge of how R&T's work was assigned among the plumbers between December 2012 and June 2013. This is particularly so in light of the testimony from Todd and Casey. Tom's deposition presented the following exchange:

Q: And do you know who took over the day-to-day operations?
A: Janine.
Q: So she was assigning people to jobs?
A: I believe so.
Q: Do you know if your sons were involved in assigning people to jobs?
A: They were the plumbers there. I'm sure they broke them up.

(Doc. 29, Ex. 3 at 29-30).

Similarly, Janine did not know specifics:

Q: So Todd and Casey had a role, or they at least were involved with deciding who was going to be—
A: I don't know. I wasn't at the shop, so I honestly don't know—
Q: Okay.
A: —how it was assigned.
. . . .
Q: So who was running the day-to-day operations beginning in January 2013?
A: Well, it was basically business as usual. I would take calls and give the information to Todd and Casey.
Q: Okay. So Todd and Casey now were in charge of assigning out the work; is that correct?
A: I'm assuming, yes.
Q: With Tom gone, you previously stated that that was his job, correct?
A: Right.
Q: So now Todd and Casey have taken over that job effective January 2013, correct?
A: Yes.

(*Id.*, Ex. 4 at 35, 67).

Q: And at that point, what changed in the shop?
A: A little bit of chaos. The guy [Tom] had told us what to do. We didn't have that anymore.
Q: So he was no longer involved?
A: No.
Q: So who would decide who was going to take what job?
A: Janine received the phone calls.
Q: Same as before, right?
A: Right. Basically, as a group, we would kind of figure out where is everybody going to go. There wasn't a lot, so it wasn't like it was a real demanding we've got to schedule this. It was this is what we've got for the day, let's do this. I wouldn't say there was anybody in charge.
Q: So Tom's no longer involved, and you, your brother [Casey] and Scott are deciding what jobs you are going to do, correct?
A: Right.

(*Id.*, Ex. 5 at 17-18). Casey similarly testified that in Tom's absence the three plumbers at R&T assigned the work among themselves based primarily on the type of project. (*Id.*, Ex. 6 at 21-22). When SP began operations, Todd testified that "I am the boss" and "I give everybody their jobs, what they need to do, what needs to be completed for that day." (*Id.*, Ex. 5 at 36). Additionally, Todd has shifted from working only in the field as a plumber to primarily working in the office and visiting sites to bid on jobs. (*Id.* at 36-38, Ex. 6 at 45, 57-58). Accordingly, the management factor weighs against alter ego status.

The undisputed facts show significant overlap in the operations of R&T and SP. First, unlike the two companies in *Dorn Sprinkler* that operated as competitors from October 2006 to March 2007, R&T ceased operations on June 14 or 15, 2013 and SP began operations on June 16, 2013. (Doc. 29, Ex. 4 at 70, Ex. 5 at 32). Not only did SP begin operations immediately after R&T closed, but all six of R&T's remaining

employees immediately began working for SP. (*Id.*, Exs. 7, 12). Casey, Scott, Ryan, and Jon continued to perform the same work with SP that they did with R&T. (*Id.*, Ex. 4 at 78, Ex. 5 at 56, Ex. 6 at 40). Todd shifted to more of a supervisory role and began to spend more time in the office and visiting jobs to place bids, but he continued to perform some plumbing work in the field. (*Id.*, Ex. 5 at 36-38, Ex. 6 at 45, 57-58). With the exception of answering phone calls, Janine carried over all of her duties and exclusively handled all of SP's financials for the first three months it operated. (*Id.*, Ex. 4 at 75-76, Ex. 5 at 34-36). SP's only new employee was Alissa, whose duties during the first three months of operation were limited almost exclusively to answering phone calls. (*Id.*, Ex. 5 at 34). It was not until September 2013 that Alissa took over SP's financials from Janine. (*Id.* at 35-36). Nonetheless, Janine continued to maintain some level of involvement with SP's administrative and financial functions until November 2013. (*Id.*, Ex. 4 at 75-76). In *Dorn Sprinkler*, the court noted that "only two of the fourteen Dorn Fire Protection employees worked for Dorn Sprinkler at or around the time of its closing, showing no real continuity of work force." *Dorn Sprinkler*, 669 F.3d at 795. Here, the continuity of work force is very pronounced.

The record also reflects that there were very few practical changes in the transition from R&T to SP. SP immediately began operating out of the same garage that R&T used. (Doc. 29, Ex. 5 at 59-60). The record does indicate that SP executed a new lease sometime in June 2013, but R&T abandoned its tools and equipment without cleaning out or vacating the garage. (*Id.*, Ex. 3 at 27-28, Ex. 5 at 59-60). The employees simply left the garage as R&T employees on June 14, 2013 and returned to it as SP employees on

June 16, 2013. SP also used the same office and mailing address as R&T from June 16, 2013 to August 20, 2013. (*Id.*, Ex. 6 at 41-42, Ex. 14 at ¶ 11). After August 20, 2013, SP obtained a P.O. box for its mailing address, moved the physical location of the office to Todd's house, and obtained new furniture. (*Id.*, Ex. 6 at 41-42, Ex. 14 at ¶ 11). This again contrasts with *Dorn Sprinkler*, where the new company "rented separate office space" from the very beginning. *Dorn Sprinkler*, 669 F.3d at 795.

The only practical change in operations between R&T and SP was that Alissa replaced Janine as the employee responsible for answering telephone calls. R&T's main telephone number was the personal phone number at Tom and Janine's house. (Doc. 29, Ex. 4 at 16). On June 15, 2013, Tom and Janine transferred that number to Alissa's cell phone, which then became SP's primary telephone number. (*Id.* at 72-73, 99, Ex. 5 at 33). Further, Tom occasionally received calls on his personal cell phone from former customers of R&T. (*Id.*, Ex. 3 at 43). Tom testified that for a short time he would direct those customers to call SP's number, the same number that R&T formerly used, without informing the customer that there was a new company. (*Id.*)

Although the companies' legal names are distinct, R. and T. Schneider Plumbing Co. and Schneider Plumbing Co., the undisputed evidence reflects that R&T was doing business as "Schneider Plumbing" since the early 1990's. (Doc. 29, Ex. 3 at 17-18, Ex. 4 at 18). R&T identified itself as "Schneider Plumbing" on all of its invoices since the mid-1990s, in the ads it placed in the telephone book, in the name painted on the sides of its vans, on its employees' uniforms, and on Tom's business cards. (*Id.*, Ex. 3 at 17-22,

37, Ex. 4 at 18, Ex. 8, Ex. 20). The undisputed fact that the two companies did business by the same name supports a finding of alter ego.

SP continued to use R&T's invoices to some extent until December 2013. (Doc. 29, Ex. 15). Plaintiffs produced an invoice dated December 4, 2013 for a job completed by Todd. (*Id.*) This invoice uses the name "Schneider Plumbing," includes Tom's name and license number, and lists the address as Tom and Janine's house, which was R&T's office and also SP's for two months. (*Id.*) A second invoice produced by Plaintiffs dated December 11, 2013 uses the name "Schneider Plumbing Company," includes Todd's license number, and lists SP's P.O. box as the address. (*Id.*, Ex. 16). At her deposition, Janine identified several additional R&T invoices that were completed by SP employees for jobs after June 2013. (*Id.*, Ex. 4 at 123-29). However, these invoices were not filed as part of the record. Plaintiffs' citations to evidence in the record reflects that SP used R&T's invoices on several occasions, but does not establish how frequently SP used those invoices. Accordingly, the Court affords this evidence minimal weight, but it does weigh in favor of finding alter ego status.

R&T and SP maintained separate financials and, with one exception, did not intermingle funds. The companies purchased a majority of their goods from the same two suppliers and maintained accounts with those companies. (Doc. 29, Ex. 4 at 20-22). However, it is also undisputed that Janine closed R&T's accounts and opened new accounts for SP. (*Id.* at 70-71). SP also signed new contracts with the telephone and utility companies, signed a new lease for the garage, obtained new liability insurance and a new tax identification number, and opened a new bank account. (*Id.* at 100, 131-34,

Ex. 5 at 57-58, 60). It is undisputed that the bank account statements for R&T and SP reflect that R&T made two separate transfers of $5,500 to SP's bank account on June 6, 2013. (*Id.*, Ex. 4 at 81-84, 91-93, Ex. 13, Ex. 18). These were the first two deposits into SP's account. (*Id.*, Ex. 13). Janine equivocally testified that she may have incorrectly made one of the $5,500 transfers from R&T to SP and later corrected the error. (*Id.*, Ex. 4 at 92-93). Although SP did not produce evidence showing a corresponding withdrawal from SP's account, the Court must view Janine's testimony in the light most favorable to SP. Accordingly, the undisputed evidence establishes that R&T transferred $5,500 to SP in June 2013. (*Id.*, Exs. 13, 18).

Notwithstanding several differences in discrete aspects of the companies' operations, the undisputed evidence reflects substantial continuity of operations between R&T and SP. Most notably are the almost identical work force and the immediate transition from R&T to SP without any practical changes. Accordingly, the operations factor weighs strongly in favor of alter ego status.

The undisputed facts also show that SP obtained almost all of its equipment from R&T without paying any consideration over two years later. In *Dorn Sprinkler*, the court noted:

> [C]ontrary to the Union's contention that Dorn Fire Protection purchased equipment from Dorn Sprinkler "in commencing operations," the tools in question were acquired after Dorn Sprinkler went out of business, so Dorn Fire Protection began operations with all of its own tools, and in fact only acquired a limited number of tools and three pickup trucks from Dorn Sprinkler. Moreover, Dorn Sprinkler sold many tools to other contractors and not just to Dorn Fire Protection. Accordingly, the overlap in equipment between the two companies was insubstantial.

Dorn Sprinkler, 669 F.3d at 795-96 (internal citations omitted). Here, it is undisputed that all the tools SP has owned and used were obtained from R&T. (Doc. 29, Ex. 3 at 27-28, Ex. 4 at 96-97, Ex. 5 at 26-27, 31-32, Ex. 6 at 35, Ex. 14 at ¶ 8). It is also undisputed that R&T has not received any payment for the tools and that no payment has been contemplated. (*Id.*, Ex. 3 at 28, Ex. 5 at 26-27). In fact, Tom twice testified that he simply "left" R&T's tools at the garage for SP to begin using. (*Id.*, Ex. 3 at 27-28). Together with Tom's total absence from R&T's operations from December 2012 to its closing in June 2013, the evidence shows that R&T's equipment was inherited by SP, not purchased in an arm's-length transaction. *See Kenmore*, 1988 WL 213821, at *2 (concluding that "the less than arm's-length dealings between Kenmore and Sloan in the course of the latter's founding" strongly supported a finding of later ego).[20]

SP also obtained three of its five vehicles and its only trailer from R&T without exchanging any consideration to date. (Doc. 29, Ex. 5 at 55, Ex. 14 at ¶ 8). The logo and lettering that R&T placed on the vehicles remains unchanged now that SP owns and operates them. (*Id.*, Ex. 6 at 57). SP produced an unsigned document that it purports is an asset purchase agreement for the three vehicles and trailer. (*Id.*, Ex. 9). The asset purchase agreement lists the blue book value for the vehicles and trailer. (*Id.*, Ex. 3 at 27, Ex. 4 at 95, Ex. 5 at 31). Tom and Todd both testified that they expect SP to pay for the vehicles. (*Id.*, Ex. 3 at 36, Ex. 5 at 30-31). However, it is undisputed that SP has not

[20] SP cites the asset purchase agreement in support of its contention that SP will pay R&T for the tools. (Ex. 9). However, the asset purchase agreement only refers to the three vehicles and one trailer. (*Id.*) The cited deposition testimony similarly discusses payments for the vehicles with no mention of the tools or equipment.

made any payments after two years of exclusive use of those vehicles. (*Id.*, Ex. 3 at 27-28, Ex. 5 at 55). The undisputed evidence also reflects that title to those vehicles remained in R&T's name for several months after SP began using the vehicles. SP obtained title to two of the vehicles from R&T on August 29, 2013. (*Id.*, Ex. 10). The title to the third vehicle was transferred on November 8, 2013. (*Id.*) Accordingly, the undisputed evidence reflects that SP began its operations using vehicles titled to R&T and has yet to pay any consideration for those vehicles. The only new equipment that SP has independently purchased is office equipment after the office moved to Todd's house on August 20, 2013. (*Id.*, Ex. 6 at 42). The undisputed fact that the majority of SP's equipment was obtained from R&T and that no payments have been made over two years later weighs heavily in favor of finding that SP is the alter ego of R&T.

The next factor is the customer base. In *Dorn Sprinkler*, nine of the new company's 250 customers were former customers of the original company. *Dorn Sprinkler*, 669 F.3d at 796. The court remarked that "proportionally speaking" this evidence was "simply not persuasive." *Id.* Here, sixty-seven of SP's 212 customers were former customers of R&T. (Doc. 29, Ex. 4 at 103-122, Ex. 17). Proportionally, SP's 31.6% overlap in customers is markedly more than the 3.6% overlap in *Dorn Sprinkler*. Several undisputed facts do militate against alter ego, including that SP did not complete any of R&T's unfinished jobs and SP did not collect money for work performed by R&T. Nonetheless, the extent of the overlap in customers supports a finding that SP is a disguised continuance of R&T.

Finding evidence of intent to avoid the effect of the CBA would require drawing an inference from the timing of Todd and Casey's meeting with the Union representative and their decision to open SP as a non-union company in April 2013. The Court cannot draw such an inference on summary judgment. However, intent to evade "is *not* essential to the imposition of alter ego status." *Indus. Contracting, LLC*, 581 F.3d at 319 (6th Cir. 2009).

The business purpose, operations, equipment, and customer factors weigh in favor of concluding that SP is the alter ego of R&T; whereas the ownership, management, and supervision factors weigh against such a determination. The Court is cognizant that "[t]he analysis is flexible and no one element should become a prerequisite to imposition of alter-ego status; rather, all the relevant factors must be considered together." *Dorn Sprinkler*, 669 F.3d at 794. Considering all the factors together, including the weight of the evidence presented with respect to each factor, the Court concludes that Plaintiffs have established that SP is the alter ego of R&T. The undisputed evidence demonstrates that operations, equipment, and work force of R&T and SP were almost identical. Notwithstanding some minor changes, SP and R&T were almost indistinguishable. Accordingly, the Court concludes that SP is the alter ego of R&T and was bound by the CBA effective June 16, 2013.

D. Termination of the CBA

The conclusion that SP was bound by the CBA as the alter ego of R&T does not end the Court's analysis. The CBA provides that it "shall remain in full force from September 1, 2011, to May 31, 2014, and shall automatically be renewed from year to

year thereafter, unless 60 days prior to the expiration of said Agreement or any renewal thereof, either party may give notice of its intent to modify or terminate said Agreement." (Ex. 2 at Art. XVII, § 18).

On March 27, 2014, SP sent a letter to the Union that stated in relevant part as follows:

> To the extent that a court ever determines that Schneider Plumbing is bound by any collective bargaining agreement or otherwise has any obligation to the Union, Schneider Plumbing hereby withdraws from the MCA and terminates any collective bargaining agreement with the Union. Please consider this correspondence to be Schneider Plumbing Co.'s sixty day written notice, pursuant to Article XVII, that it intends to terminate any collective bargaining agreement with or other obligation to the Union. Accordingly, the collective bargaining agreement shall not renew upon its expiration on May 31, 2014.

(Doc. 27, Ex. 5-4). There is no dispute that this letter complied with the requirements of the CBA. Accordingly, SP properly terminated the CBA effective May 31, 2014.

V. CONCLUSION

Wherefore, for these reasons, Plaintiffs' Motion for Summary Judgment (Doc. 26) is **GRANTED** and Defendant Schneider Plumbing Co.'s Motion for Summary Judgment (Doc. 27) is **DENIED**. Schneider Plumbing Co. shall produce all documents necessary for Plaintiffs to complete a payroll compliance audit forthwith. The parties shall submit a joint proposed briefing schedule on the issue of damages to Chambers (black_chambers@ohsd.uscourts.gov) within twenty-one days of the entry date of this Order.

IT IS SO ORDERED.

Date: 7/10/2015

s/ Timothy S. Black
Timothy S. Black
United States District Judge